APPENDIX A — IN THE MATTER OF DOE, SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, DECIDED JANUARY 31, 1996

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ATLANTIC COUNTY

DOCKET NO. ATL-L-3693-95

IMO

JOHN DOE and ROE CORPORATION

OPINION

Decided: January 31, 1996

Angelo Bianchi for petitioner

William Gicking, Thomas W. Goan, Jr. and Linda A. Rinaldi for respondent (Office of the Attorney General, State of New Jersey)

WILLIAMS, A.J.S.C.

Petitioners John Doe and Roe Corporation, having been served with Investigative Interrogatories under New Jersey's RICO statute, *N.J.S.A.* 2C:41-1 to 41-6.2, come before the court to have the Interrogatories modified or set aside.

On July 27, 1995, the Attorney General's office served Petitioners with Investigative Interrogatories pursuant to *N.J.S.A.* 2C:41-5. The Interrogatories directed Petitioners to appear at

the offices of the Division of Criminal Justice Organized Crime and Racketeering Bureau to furnish information demanded therein in connection with an investigation of the alleged "control and financing of Roe Corporation and its owner John Doe by Organized Crime." September 11, 1995 was designated as the return date for response to the Interrogatories, which date was thereafter extended by the Attorney General to September 18, 1995. The Interrogatories further indicated that compliance could be effected by delivery of all of the requested materials, prior to the return date, to a designated state police detective.

On September 12, 1995, Petitioners initiated proceedings in Essex County, pursuant to *N.J.S.A.* 2C:41-5j, to modify or set aside the Investigative Interrogatories. The next morning, on September 13, 1995, the Attorney General filed a Petition in Atlantic County, pursuant to *N.J.S.A.* 2C:41-5i, to Compel Answers to the Interrogatories. The files were sealed by the court in both counties.

On September 29, the court dismissed the Attorney General's Petition to Compel Answers as prematurely filed, based upon the pendency of Petitioners' application in Essex County. Thereafter, on October 2, the proceedings were transferred to Atlantic County for disposition.

Petitioners assert a potpourri of arguments upon which their requests for relief are based. Some are asserted with greater clarity than others. As set forth in their brief, those arguments are as follows:

* "*N.J.S.A.* 2C:41-5 is unconstitutional";

* "They [Investigative Interrogatories] violate

[Petitioners'] right to be free from unreasonable searches and seizures and they fail to establish any connection between [Roe Corporation's] records and the Attorney General's investigation";

* "They violate [Petitioners'] right to due process of law";

* "They violate [Petitioners'] right to be free from self-incrimination";

* "*N.J.S.A.* 2C:41-5 was not enacted to be used against targets of RICO investigations"; and

* "Most of the questions asked are so broad, overbearing and not capable of being fully answered, or not of a nature to lead to relevant discoverable matter, that they should be struck."

In addressing these arguments, an understanding of the history of our RICO statute is helpful. On October 15, 1970, the United States Congress enacted the Racketeer Influenced and Corrupt Organizations (RICO) provisions of the Organized Crime Control Act as a weapon against the pervasive influence of organized crime. *See*, 18 *U.S.C.A.* §§ 1961 to 1968. RICO was predicated upon the realization that organized crime and its predatory practices in business ventures threatened the integrity of the American economy and the security of the public. *See*, *S. Rep.* No. 617, 91st Cong., 1st Sess., 76-79 (1969). The RICO Act enhanced efforts to combat the evils of organized crime through the creation of new criminal offenses in circumstances where businesses were acquired, controlled, or operated through activities or funds originating from patterns of racketeering

activity. *See*, 18 *U.S.C.A.* §§ 1961, 1962. In addition, it created new causes for civil relief and included provisions for private enforcement of civil RICO claims. *See*, 42 *U.S.C.A.* § 1964. It also created additional investigative tools in the form of investigative demands, 42 *U.S.C.A.* § 1968, and provided for sanctions in the form of forfeiture and treble damages. 42 *U.S.C.A.* § 1964.

In the decades following the federal enactment of RICO, many states have adopted RICO-type statutory schemes. *See*, *Ariz. Rev. Stat. Ann.* 13-2301 to 13-2316; *Cal. Penal Code* 186-186.8; *Colo. Rev. Stat. Ann.* 18-17-101 to 18-17-109; *Conn. Gen. Stat. Ann.* 53-393 to 53-403; *Del. Code Ann.* tit. 11, 1501-1511; *Fla. Stat. Ann.* 895.01-895.05; *Ga. Code. Ann.* 16-14-1 to 16-14-15; *Haw. Rev. Stat.* 842-1 to 842-12; *Idaho Code* 18-7801 to 18-7805; *Ill. Rev. Stat.* ch. 56 ½, 1651-1661; *Ind. Code Ann.* 35-45-6-1 to 35-45-6-22; *La. Rev. Stat. Ann.* 15:1351-56; *Miss. Code Ann.* 97-43-1 to 97-43-11; *Nev. Rev. Stat. Ann.* 207.350-.520; *N.J.S.A.* 2C:41-1 to 2C:41-6.2; *N.M. Stat. Ann.* 30-42-1 to 30-42-6; *N.Y. Penal Law* 460.00-.80; *N.C. Gen. Stat.* 75-D-1 to 75-D-14; *N.D. Cent.* Code 12.1-06.1-01 to 12.1-06.1-08; *Ohio Rev. Code Ann.* 2923.31-.36; *Okla. Stat. Ann.* tit. 22 1401-1419; *Or. Rev. Stat.* 166.715-.735; *Pa. Cons. Stat. Ann.* tit. 18,911; *R.I. Gen. Laws* 7-15-1 to 7-15-11; *Tenn. Code Ann.* 39-12-201 to 39-12-210; *Utah Code Ann.* 76-10-1601 to 76-10-1608; *Wash. Rev. Code Ann.* 9A.82.010-.901; *Wis. Stat. Ann* 946.80-.88.

New Jersey enacted a Racketeering section in 1981 as part of its Code of Criminal Justice. *L.* 1981, *c.* 167 (codified at *N.J.S.A.* 2C:41-1 to 41-6.2.) The express legislative intent of New Jersey's RICO statute is set forth in section 2C:41-1.1, which provides:

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The Legislature hereby finds and declares to be the public policy of this State, the following:

a. By enactment of the "Criminal Justice Act of 1970," *P.L.* 1970, *c.* 74 (C. 52: 17B-97 et seq.), the Legislature recognized that the existence of organized crime and organized crime type activities presents a serious threat to the political, social, and economic institutions of this State.

b. Despite the impressive gains of our law enforcement agencies, organized crime and similar activities in this State are still a highly sophisticated, diversified and widespread activity that annually drains millions of dollars from the State's economy by unlawful conduct and the illegal use of force, fraud and corruption. In recent years, that organized crime and organized criminal activity has[sic] spread to the operation of otherwise legitimate businesses.

c. In order to safeguard the public interest, effective criminal and civil sanctions are needed to prevent, disrupt and eliminate the infiltration of organized crime type activities which are substantial in nature into the legitimate trade or commerce of this State. It is, therefore, in the public interest to provide that activity which is inimical to the general health, welfare and prosperity of the State and its inhabitants be made subject to strict civil and criminal sanctions.

Like its federal counterpart, the New Jersey RICO statute is premised on the need to address the influence of organized crime upon New Jersey businesses. One mechanism authorized

in the Federal RICO statute to combat organized crime was the use of investigative demands. *See*, 11 *U.S.C.A.* § 1968. Like the federal RICO statute, the New Jersey RICO statute also provides for the issuance of investigative demands, referred to in this State as "Investigative Interrogatories." *N.J.S.A.* 2C:41-5a, provides:

> Whenever the Attorney General determines that there exists a reasonable suspicion that any person or enterprise may have information or be in possession, custody, or control of any documentary materials relevant to an investigation under this chapter, or whenever the Attorney General believes it to be in the public interest that an investigation be made pursuant to this chapter, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon the person, an investigative interrogatory requiring him to answer and produce materials for examination.

Pursuant to this section, the Attorney General served the Investigative Interrogatories herein, thereby giving rise to the application to modify or set aside now before this court.

In the first of their challenges to the Interrogatories, Petitioners argue that the RICO statute is "unconstitutional" in that it impermissible gives the Attorney General the power to act as both Prosecutor and Grand Jury. Petitioners' general claim of unconstitutionality sounds in the nature of a separation of powers argument, although not precisely so stated.

Petitioners argue that because the Investigative Interrogatories require that the requested information be

furnished directly to the Attorney General, the Attorney General is therefore given the power to act as both Prosecutor and Grand Jury. Petitioners cite *State v. Hilltop Private Nursing Home Inc.*, 177 *N.J. Super.* 377 (1981), to support an assertion that the Attorney General does not possess and cannot exercise such investigative powers.

This reliance upon *Hilltop* is misplaced. In *Hilltop* the Court recognized the independence of the Grand Jury as a public institution and reaffirmed the principle that a Prosecutor did not have the inherent power to subpoena any individual to appear before the Prosecutor's office and produce evidence. *Id.* at 389 (citing *State v. Foy*, 146 *N.J. Super.* 378, 391 (Law Div. 1976), *app. dism.* 153 *N.J. Super.* 803 (App. Div. 1977); *United States v. Dionisio*, 410 *U.S.* 1, 93 *S. Ct.* 764, 35 *L. Ed.* 2d 67 (1973)). The Prosecutor could only issue a *subpoena duces tecum* returnable for a date on which a Grand Jury would actually be sitting, and although such a subpoena could allow for voluntary delivery of the requested materials directly to the Prosecutor, it could not restrict the opportunity to present the materials directly to the Grand Jury if the witness so desired. *Hilltop* was premised, however, on the extent of powers inherent in the executive branch of government. It did not contemplate a situation involving an explicit grant of investigative powers to the Attorney General by the Legislature, such as in this case.

The use of interrogatories or investigative demands is not unusual. Such tools have long been used in the context of antitrust and securities matters. *See*, *N.J.S.A.* 56:9-9; 15 *U.S.C.A.* §§ 1312-1313 (antitrust civil investigative demands); 15 *U.S.C.A.* § 78u (SEC investigations). Investigative demands, like those in both the federal and New Jersey RICO statutes, enable the Attorney General to determine whether a racketeering

violation has occurred and if civil or criminal proceedings should be instituted. That the Legislature may supplement the investigative power inherent in the Executive Branch is beyond question. *U.S. v. DeGrosa*, 405 F.2d 926, *cert. denied*, *Zudick v. U.S.*, 394 *U.S.* 973, 89 *S. Ct.* 1465, 22 *L. Ed.* 2d 753; *Application of Waterfront Commission of New York Harbor*, 32 *N.J.* 323 (1960); *Greenblatt v. New Jersey Bd. of Pharmacy*, 214 *N.J. Super.* 269 (App. Div. 1986). Petitioners' challenge on this basis is therefore without merit.

Petitioners next assert that because *N.J.S.A.* 2C:41-5 does not require a showing of probable cause before the Attorney General may serve Investigative Interrogatories, the statute is violative of the right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution.

Petitioners are correct in observing that nothing in the statute requires a showing of probable cause before interrogatories may be issued. However, such a standard is not required by either the United States or New Jersey Constitutions. In *Oklahoma Press Publishing Co. v. Walling*, 327 *U.S.* 186, 66 *S. Ct.* 494, 90 *L. Ed.* 614 (1946), the Court set out three conditions for the validity of an administrative subpoena. Under the *Oklahoma Press* standard, the administrative subpoena must be sought for a "lawfully authorized purpose," documents requested must be "relevant to the inquiry," and adequate specification of those documents must be provided. *Id.* at 209. While the Court stated that an agency may not act arbitrarily or in excess of its statutory authority, it also emphasized that the inquiry need not be limited by "forecasts of the probable result or the investigation." *Id.* at 216 (quoting *Blair v. United States*, 250 *U.S.* 273, 282, 39 *S.*

Ct. 468, 471, 63 *L. Ed.* 979 (1919)). In *United States v. Morton Salt Co.*, 338 *U.S.* 632, 70 *S. Ct.* 357, 94 *L. Ed.* 401 (1950), the Court upheld the broad powers of administrative inquiry, expressly likening the proper scope of an administrative subpoena to the broad powers of inquiry possessed by the Grand Jury. Affirming this position, the Court in *United States v. Powell*, 379 *U.S.* 48, 85 *S. Ct.* 248, 13 *L. Ed.* 2d. 112 (1964), stated that an agency need not show probable cause but only must demonstrate that its purpose is legitimate under statute, that the inquiry is relevant to that purpose, and that the required administrative steps have been duly followed. As with Grand Jury subpoenas, an unreasonably broad or overly burdensome administrative demand may be set aside or modified, but the party challenging the demand bears the burden of proof. *FTC v. Texaco, Inc.*, 555 *F.*2d 862, 882 (D.C. Cir. 1977). As such, with respect to the proper standard of judicial scrutiny, case law has essentially treated the Grand Jury subpoena and the civil investigative demand in a similar fashion.

New Jersey's RICO Act has done the same. The Legislature has expressly provided a standard to determine what information may be requested in an investigative interrogatory.

N.J.S.A. 2C:41-5c provides:

> No interrogatory shall:
>
> (1) Contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued in aid of a Grand Jury investigation; or
>
> (2) Require the production of any documentary

> evidence which would be otherwise privileged from disclosure if demanded by a subpena duces tecum issued in aid of a Grand Jury investigation.

The standard to be applied in a challenge to an Investigative Interrogatory issued under New Jersey's RICO statutes is therefore the same as that applied to a *subpoena duces tecum* issued in aid of a Grand Jury investigation. Under Fourth Amendment analysis, a *subpoena duces tecum* is reasonable without probable cause if it is "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *In re Addonizio*, 53 *N.J.* 107, 128 (1968) (quoting *See v. City of Seattle*, 387 *U.S.* 541, 544, 87 *S. Ct.* 1737, 1740, 18 *L. Ed.* 2d 943, 947 (1967)); *See*, *Greenblatt* 214 *N.J. Super.* at 275. Petitioners' argument that the statute must require a showing of probable cause is simply not well founded.

Furthermore, the statute provides for a judicial hearing to independently evaluate an interrogatory request before any response need be provided. *N.J.S.A.* 2C:41-5j states:

> At any time before the return date specified in the interrogatory, such person may file in the Superior Court a petition for an order modifying or setting aside the interrogatory. The time allowed for compliance of the interrogatory, in whole or in part as deemed proper and ordered by the court, shall not run during the pendency of such petition in the court. The petition shall specify each ground upon which the petitioner relies in seeking relief, and may be based upon any failure of the interrogatory to comply with the provisions of this section or upon

> any constitutional or other legal right or privilege of the petitioner. In such proceedings the Attorney General shall establish the existence of an investigation pursuant to this chapter and the nature and subject matter of the investigation.

Thus, under subsection (j), a party served with Investigative Interrogatories pursuant to the statute may obtain independent judicial review of the reasonableness of the demand prior to incurring any obligation to comply. *See*, *See v. Seattle*, 387 *U.S.* at 544-545, 87 *S. Ct.* at 1739-1740, 18 *L. Ed.* 2d at 947 (1967).

Petitioners' additional assertion that a "seizure" has occurred is also without merit. It is well established that although a subpoena to appear before a Grand Jury may be inconvenient or burdensome, it is not viewed as a seizure within the meaning of the Fourth Amendment. *In re Grand Jury Proceedings Harrisburg Grand Jury*, 658 F.2d 211, 213 (3d Cir. 1982).

Petitioners next argue that the enforcement provisions of this section of the RICO statute violate their right to due process. They assert that *N.J.S.A.* 2C:41-5i, on its face, does not afford process equal to that given a witness subpoenaed to appear before a Grand Jury. Petitioners argue that the statute permits the Attorney General to obtain an order directing compliance with the Investigative Interrogatory, without first giving a targeted individual or corporation notice and an opportunity to be heard. *N.J.S.A.* 2C:41-5i provides as follows:

> Whenever any person fails to comply with any investigative interrogatory duly served upon him under this section or whenever satisfactory copying

> or reproduction of any materials cannot be done and the person refuses to surrender that material, the Attorney General may file in the Superior Court a petition for an order for the enforcement of this section.

Due process is a dynamic concept whose "sense of fairness cannot be imprisoned in crystal." *Callen v. Sherman's Inc.*, 92 *N.J.* 114, 134 (1983). Notwithstanding the flexible nature of due process, it is settled that "the guarantee requires, at the minimum, notice to the affected party combined with an effective opportunity to respond." *In re Promulgation of Guardianship Services Req.*, 103 *N.J.* 619, 632 (citing *Cleveland Bd. of Education v. Loudermill*, 470 *U.S.* 532, 546, 105 *S. Ct.* 1487, 1495, 84 *L.Ed.* 2d 494, 506 (1985)). In determining whether a constitutional defect exists within a statute, the court must preliminarily assume that the Legislature intended to act in a constitutional manner. *Right to Choose v. Byrne*, 91 *N.J.*; 287, 311 (1982) (citing *State v. Profaci*, 56 *N.J.* 346, 349-50 (1970)). The court's duty is to save a statute if it is reasonably susceptible to a constitutional interpretation. *Id.*

When *N.J.S.A.* 2C:41-5 is read as a whole, there is no doubt that a person is never compelled to comply with Investigative Interrogatories under this statute without being afforded an opportunity for independent review. It is correct, that read in isolation, *N.J.S.A.* 2C:41-5 does not explicitly provide for notice to the recipient in the event the Attorney General petitions the court to compel compliance. However, the provisions of the Act must be read *in pari materia*. *N.J.S.A.* 2C:41-5j provides for the filing of a petition by a recipient of Investigative Interrogatories to modify or set aside the Interrogatories. Pursuant to the provisions of *N.J.S.A.* 2C:41-5j, this matter is,

in fact, now before this court for review. Inclusion of this provision demonstrates the legislative sensitivity to due process rights. Where the Legislature has provided the recipient of Interrogatories with an opportunity to seek judicial modification or set aside of Interrogatories, it is inconceivable that it did not also intend that there be a right to notice and a hearing on a petition to compel compliance filed by the Attorney General.

When determining that a notice requirement is necessary to maintain the constitutionality of a statute, the court may read such a requirement into the statute. *See*, *Right to Choose v. Byrne*, 91 *N.J.* at 311 (1982); *State v. DeSantis*, 65 *N.J.* 462, 473 (1974). A fair reading of the Act as a whole compels the conclusion that the Legislature intended that notice be given by the Attorney General when filing a petition pursuant to *N.J.S.A.* 2C:41-5i. As such, the challenged section fully protects Petitioners' constitutional right of due process.

Petitioners next argue that a review of the legislative history indicates that *N.J.S.A.* 2C:41-5 was not intended to be used against targets of RICO investigations. Petitioners assert that since they are targets of the investigation, the State may not obtain information from them by way of the investigative interrogatory process. It is not clear to the court that the Attorney General has explicitly identified Petitioners as targets of the investigation. The analysis of this issue will proceed, however, as if Petitioners were such targets.

On October 30, 1980, the Assembly Judiciary, Law, Public Safety and Defense Committee conducted a hearing pursuant to its consideration of Assembly Bill 1079. To support their assertion that targets of an investigation were to be excluded from the provisions dealing with investigative interrogatories,

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Petitioners rely upon certain selected statements made during that Committee hearing.

In response to a question from Assemblyman Herman about how the committee could protect against prosecutorial abuse, the Deputy Attorney General stated:

> [W]ell, this section of the bill was designed in two parts, the first was *to give the Attorney General the power to gather evidence from, primarily, third parties*, individuals who may have knowledge of a particular activity that would fit into the government's overall idea of what happened. (emphasis added)

Petitioners point to this statement to assert that the legislation was directed toward third parties and not targets of an investigation. However, the statement does not indicate that the supporters of the legislation intended to exclude targets of an investigation from its provisions. The statement that the bill was designed to give the Attorney General power to gather evidence "primarily" from third parties suggests that the proponents of the bill recognized that in some instances interrogatories would be directed to targets or potential targets and did not intend that the powers be used exclusively with respect to third parties. When setting forth examples of other statutes with similar investigative devices, the Deputy Attorney General referred to New Jersey's Antitrust Act which, he indicated, was used to investigate garbage collectors in the State who combined to restrain trade. He stated:

> We used the investigative demand tool to go to people who purchased garbage services throughout

> the service [sic] by means of questionnaire. We asked them to respond as to who was providing the service, what price, how they went about choosing their collectors, whether or not the attempt to choose another collector was made and whether they [were] able to get the service.

Later, in response to a question about that specific investigation, he further responded:

> *We didn't send Interrogatories to any people we felt were targets of our Interrogatories.* These Interrogatories were primarily sent to people like yourselves who might have been part of the garbage industry and they have purchased services and had valuable information for us in order for us to pinpoint the particular targets or areas of concern. (emphasis added)

Petitioners point to this statement as further support for their argument that there was an intent to exclude targets from the statute. It is clear, however, that this statement about not sending interrogatories to targets was in direct response to a question about the use of interrogatories in a specific investigation and not a general statement about the intended scope of the legislation.

Finally, Petitioners rely upon the following statement made by Governor's Counsel during the hearings: "It's not the targets we're targeting here."

This statement occurred in the context of a discussion concerning how safeguards could be provided in a situation

where interrogatories were sent to a target of the investigation. The Public Defender argued that the only way to provide adequate safeguards would be to prevent the use of Investigative Interrogatories directed at targets. In this context, Governor's Counsel's remarks can be seen as nothing more than a reiteration of the Deputy Attorney General's comments that the Investigative Interrogatories were to be used primarily for non-targets.

In seeking to provide adequate safeguards, the Committee thereafter disregarded the suggestion of limiting the Interrogatories to nontargets. Instead, the Committee focused on other means of procedural protection. Assemblyman Herman, the Committee Chair, stated:

> Maybe the answer here, while we are thinking of proposing amendments, maybe each questionnaire that is sent out ought to tell him that he has a right to counsel and ought to tell him, if he objects, he has a right to contest it under this particular section, as just one of the potential safeguards.

Upon reconvening after a Committee recess, the following colloquy occurred between the Deputy Attorney General and the Committee Chair:

> DEPUTY ATTORNEY GENERAL: You asked, also, for protection to the recipients of the Interrogatories and we propose adding another sub-paragraph under paragraph B, so that the Interrogatories shall contain an affirmative advice to the recipient that he may discuss these investigative demands with an attorney prior to returning it or making the material available for inspection,

> pursuant to subsection F. . . . Also there is paragraph J, that he has the right to apply to the court prior to making any return of the preliminary reply.
>
> ASSEMBLYMAN HERMAN: Okay. That goes a long way in balancing our sense of fair play.

The function of the court in construing any statute is to give effect to the legislative intention and purpose. *State v. Valentin*, 208 *N.J. Super.* 536, 535 (App. Div. 1986); *Raybestos-Manhattan, Inc. v. Glaser*, 144 *N.J. Super.* 152, 167 (Ch. Div. 1976). In examining legislative intent, the court must first direct its inquiry to the actual language of the statute. *Schiavo v. John F. Kennedy Hosp.*, 258 *N.J. Super.* 380, 386 (App. Div. 1992), *aff'd.*, 131 *N.J. Super* 400 (1993). It is to be presumed that the legislative intent is expressed by the ordinary meaning of the words used, and if the statutory language is clear, it is not necessary to examine legislative history. *Licata v. U.S. Postal Service*, 33 F.3d 259, 261 (3rd Cir. 1994); *Harris v. Harris*, 749 F.2d 1009, 1013 (3rd Cir. 1984); *State v. Mortimer*, 135 N.J. 517, 532, *cert. denied*, 115 *S. Ct.* 440, 130 *L. Ed.* 2d 351 (1994). The court must therefore seek to ascertain the intention of the Legislature from the plain meaning of the statute and determine what sensible legislators would intend a court to do. *State v. Zahl*, 259 *N.J. Super.* 372, 375 (Law 1992); *Johns-Manville Products Corp. v. Dronebarger*, 211 *N.J. Super.* 520, 505 (Law 1986).

N.J.S.A. 2C:41-5a expressly provides the Attorney General may serve Interrogatories on "any person or enterprise" that may have relevant information. The language used in the statute is specific and in no way does it distinguish between classes of persons or enterprises. Nothing on the face of the statute indicates

an intent to exclude targets from its scope. Neither is the legislative history offered by Petitioners persuasive that the Legislature intended to exclude targets of an investigation from the scope of the Investigative Interrogatory provisions. While the statements of the Deputy Attorney General and others suggest that the focus of the legislation may primarily have been directed to non-targets of an investigation, nothing in the transcript of the Committee proceeding suggests that the Legislature specifically intended to exclude target witnesses from ever receiving Investigative Interrogatories. That possibility was explicitly raised by the public defender in the legislative hearings and was not pursued by the Committee. If there were a clear legislative intent to limit Interrogatories to only non-targets, such express language could easily have been included in the statute.

Furthermore, the Investigative Interrogatories are subject to the same standards as a Grand Jury *subpoena duces tecum.* Within the context of the Grand Jury, both targets and non-targets are subject to subpoena. *See, State v. Sarcone,* 96 *N.J. Super.* 501 (Law Div. 1967). Just as targets are not excluded from the Grand Jury, there is no reason to believe that they were intended to be excluded from the scope of *N.J.S.A.* 2C:41-5.

As a practical matter, it may sometimes be difficult, if not impossible, to determine when a non-target witness becomes a target. Such could occur at any point during the course of an investigation. For this reason, the statute provides safeguards directed towards the type of information sought, not the status of the person served. If Investigative Interrogatories are served upon a target of an investigation, there is nothing to suggest that the target may not assert all of the protections that would be available if he had been served with a Grand Jury subpoena in the same investigation.

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Petitioners raise two additional issues which will be addressed as required in further proceedings. First, Petitioners assert that the Investigative Interrogatories herein are overbroad. They cite *N.J. Court Rule* 4:10-3, which authorizes the court to enter protective orders in civil proceedings. It is clear however, that said Rule does not provide the standard applicable herein.

N.J.S.A. 2C:41-5c provides:

> No interrogatory shall:
>
> (1) Contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued in aid of a Grand Jury investigation; or
>
> (2) Require the production of any documentary evidence which would be otherwise privileged from disclosure if demanded by a subpena duces tecum issued in aid of a Grand Jury investigation.

The standard to be applied to a claim that the Interrogatories are overbroad is the same standard that would be applied to the issuance of a Grand Jury subpoena. Such an analysis with respect to the Interrogatories herein will require further proceedings which will be scheduled by this court forthwith.

Petitioners next argue that, based upon their Fifth Amendment privilege against self-incrimination as guaranteed to the states through the due process clause of the Fourteenth Amendment, they are not compelled to answer the Interrogatories. *See*, *Malloy v. Hogan*, 378 *U.S.* 1, 84 *S. Ct.* 1489, 12 *L.Ed.* 2d 653 (1964).

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The Fifth Amendment does not prohibit the State from asking questions. *In re Martin*, 90 *N.J.* 2957 331 (1982). In response to such questions, one has the liberty either to waive the privilege by answering the incriminatory question or to assert the privilege and refuse to incriminate oneself. *State v. Toscano*, 13 *N.J.* 418, 423 (1953). Where the privilege is asserted, the Attorney General may challenge the validity of the privilege claim through application to the court. *In re Boyd*, 36 *N.J.* 285 (1962); *In re Boiardo*, 34 *N.J.* 599 (1961); *State v. DeCola*, 33 *N.J.* 335 (1960). Such a proceeding requires an analysis of each individual question eliciting a claim of privilege. The court cannot simply accept the witness's statement that the requested answer will tend to incriminate the witness. *In re Boiardo*, 34 *N.J.* at 606. Rather, the witness must support his assertion of privilege by a statement to the court specifically indicating the nature of the incrimination which the witness fears. The witness must establish a legitimate basis for the fear of criminal prosecution. *DeCola*, 33 *N.J.* at 350. If the witness is a target of the investigation, however, such witness need show no more than that fact in order to support his or her Fifth Amendment claim. *In re Addonizio*, 53 *N.J.* 107 (1968).

Resolution of this issue is premature. Petitioners have not yet responded to the Interrogatories, so it is not clear whether the privilege will actually be asserted with respect to some or all of the questions. If such were to happen, it is not certain that the Attorney General would necessarily challenge the claim of privilege in whole or in part. Furthermore, the privilege has not been held to apply to corporations. *United States v. White*, 322 *U.S.* 694, 698, 64 *S. Ct.* 1248, 1251, 88 *L.Ed.* 1542, 1546 (1944). Therefore, even if Petitioner Doe were to assert a privilege on his behalf as an individual, it would appear that answers would nevertheless have to be provided by Petitioner Roe Corporation.

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The court will schedule further proceedings on Petitioners' claims that the Interrogatories are overbroad and unduly burdensome. If additional proceedings are required with respect to a Fifth Amendment claim of privilege, such will be scheduled as necessary. In all other respects, Petitioners' application to modify or set aside the Interrogatories is denied. The Attorney General will submit an appropriate order.

APPENDIX B — IN THE MATTER OF DOE, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED JUNE 20, 1997

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-4643-95T1

In the Matter of JOHN DOE and ROE CORPORATION.

Argued March 24, 1997 - Decided Jun 20 1997

Before Judges Brochin, Kestin and Eichen

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County

Angelo R. Bianchi argued the cause for petitioners John Doe and Roe Corporation (Bianchi & Bianchi, attorneys; Mr. Bianchi and Mark A. Wenczel, on the brief).

Linda A. Rinaldi, Deputy Attorney General, argued the cause for respondent State of New Jersey (Peter Verniero, Attorney General of New Jersey, attorney; Ms. Rinaldi, of counsel and on the brief).

The opinion of the court was delivered by

BROCHIN, J.A.D.

Appendix B

The New Jersey Attorney General served investigative interrogatories on John Doe and Roe Corporation[1] pursuant to *N.J.S.A.* 2C:41-5. That statute reads in part as follows:

> a. Whenever the Attorney General determines that there exists a reasonable suspicion that any person or enterprise may have information or be in possession, custody, or control of any documentary materials relevant to an investigation under this chapter [Chapter 41, Racketeering], or whenever the Attorney General believes it to be in the public interest that an investigation be made pursuant to this chapter, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon the person, an investigative interrogatory requiring him to answer and produce material for examination.

The attorney general served two sets of interrogatories, one on John Doe and one on Roe Corporation. Both sets were substantially identical. Each set consisted of 291 questions. Many of the questions had multiple subparts. The interrogatories also required the parties to whom they were addressed to produce all of the corporate records of Roe Corporation. A face sheet attached to each set of interrogatories recited that the information asked for was necessary in connection with the enforcement of the New Jersey Racketeering Law, *N.J.S.A.* 2C:41-1 *et seq.* and, although the language of the face sheet is ambiguous, it apparently was intended to allege that the suspected conduct which constituted racketeering was "[t]he

1. The Law Division used these fictitious names to designate the individual and the corporation to whom the interrogatories were directed. We have adopted the same practice in this opinion.

control and financing of [Roe Corporation] and its owner, [John Doe], by Organized Crime."

N.J.S.A. 2C:41-5j reads in part as follows:

> At any time before the return date specified in the interrogatory, such person [i.e., any person upon whom an investigative interrogatory has been served] may file in the Superior Court a petition for an order modifying or setting aside the interrogatory. . . . The petition shall specify each ground upon which the petitioner relies in seeking relief, and may be based upon any failure of the interrogatory to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the petitioner. In such proceeding the Attorney General shall establish the existence of an investigation pursuant to this chapter and the nature and subject matter of the investigation.

Pursuant to this section, Doe and Roe petitioned the Law Division of the Superior Court "to set aside the Investigative Interrogatories and accompanying request for documents pursuant to *N.J.S.A.* 2C:41-5(j)."

Doe and Roe's petition alleged the following grounds for relief:

> (1) . . . The investigative powers delegated to the attorney general under *N.J.S.A.* 2C:41-5 are unconstitutional [because] [t]hey impermissible give the attorney general the power to act as prosecutor and grand jury.
>
> . . .

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> The attorney general has failed to satisfy *N.J.S.A.* 2C:41-5b(1) by failing to adequately "state the nature of the conduct constituting the alleged violation which is under investigation." . . .
>
> (2) . . . The investigation violates [Doe's] right to be free from unreasonable searches and seizures. *N.J.S.A.* 2C:41-5 does not require the attorney general to establish probable cause. Reasonable suspicion suffices. . . .
> [N]o reasonable basis for the State's suspicion exists.
>
> (3) . . . [T]he investigative interrogatories served upon [Doe] and [Roe] unconstitutionally deprive [Doe] of his right to due process of law . . . .
>
> (4) . . . On the basis of his reasonable fear that the questions put to him will tend to incriminate, [Doe] petitions this court to set aside the Investigative Interrogatories as they violate his right to be free from self-incrimination.

The Law Division (Honorable Richard J. Williams, A.J.S.C.) heard extensive argument on Doe and Roe's petition and on the State's motion to enforce its investigative interrogatories. On October 27, 1995, the petitioners argued their constitutional and statutory objections to the interrogatories. At the commencement of the hearing on that date, Judge Williams summarized his understanding of the issues which petitioners were raising. To the issues which we have listed from the brief submitted in support of the petition, he added the following: "that the investigative interrogatories are overbroad, unduly burdensome, and unreasonably intrusive."

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Judge Williams issued his comprehensive, published opinion sustaining the constitutionality of *N.J.S.A.* 2C:41-5 on January 31, 1996. *See In re Doe*, 294 *N.J. Super.* 108 (Law Div. 1996). The court rejected the petitioners' contentions that the interrogatories should be set aside because petitioners were the intended targets of the State's investigation, *id.* at 123-26, but the court required further hearings to consider petitioners' contentions that the individual questions included in the interrogatories were unnecessarily and unfairly broad, vague, and intrusive. *Id.* at 127.

On February 23 and February 26, 1996, the hearings were held. As an initial matter, the court rejected the petitioners' contentions that the interrogatories should be set aside because the State had leaked Doe's and Roe's identity to the news media. The court then considered the interrogatories, one by one, and ruled on every objection to their form and substance that petitioners chose to raise. As a result of the arguments presented, the State withdrew or modified many of its interrogatories and the Court struck or modified many others. No copy of the interrogatories, either as originally served on petitioners or as ultimately modified, have been included in the record submitted to us. In their brief to our court, petitioners have not challenged any of the interrogatories because of their specific form or content.

These determinations by Judge Williams resulted in the entry of an interlocutory order dated March 26, 1996 requiring Roe Corporation to accord the state access to its documents and both petitioners to answer the interrogatories within fourteen days; a supplemental order dated April 23, 1996, ordering fines for noncompliance with the prior order; and a June 7, 1996 order denying reconsideration. Petitioners' appeal disputes these

orders on essentially the same grounds as those which they urged before the Law Division, except that they no longer challenge the form or content of individual questions.

With respect to all of the issues raised by petitioners' arguments before Judge Williams and dealt with in his published opinion, we affirm on the basis of that opinion. Petitioners also argue to us that they should be relieved from answering the investigative interrogatories because the identity of Doe and Roe and the racketeering activities of which they are suspected were disclosed to the news media and because the State failed to establish a statutory predicate for enforcement of the interrogatories. These arguments, based on the "leak" and the alleged failure to establish a statutory predicate, are not expressly dealt with in the published opinion or any of the subsequent orders. However, Judge Williams dealt with them in an informal ruling on the record.

In that ruling, Judge Williams held that the petitioners had not proved that the State was the source of the disclosure which resulted in newspaper stories identifying petitioners, their business activities, and their alleged connections with organized crime, and that, if some State employee was the source, the statute itself prescribed the exclusive remedy. We agree. *N.J.S.A.* 2C:41-5f states, in relevant part:

> Any person who shall disclose to any person other than the Attorney General or a person retained by the Attorney General as set forth above, the name of any person who receives an investigative interrogatory or any information obtained pursuant thereto, except in proceedings involving an alleged violation of this chapter and except as so directed

by the Attorney General shall be guilty of a crime of the fourth degree.

The court does not have the authority to create any other remedy for the disclosures indicated by the record in this case.

N.J.S.A. 2C: 41-5a permits an investigative interrogatory to be issued whenever the Attorney General determines that there is a "reasonable suspicion that any person or enterprise may have information or be in possession . . . of any documentary materials relevant to an investigation" or "whenever the Attorney General believes it to be in the public interest that an investigation be made" pursuant to the racketeering laws. As Judge Williams held, a showing of probable Cause is not required either by the statute or by the Federal or State Constitution. *In re Doe*, 294 *N.J. Super.* at 119. The statute requires only "a reasonable suspicion" that the person to whom the interrogatory is directed "may have information" relevant to a present investigation or to an investigation which the Attorney General believes would be in the public interest. These statements are merely iterations of the basic proposition that the Attorney General has broad authority and discretion to conduct an investigation into any suspected criminal activity. This is an authority and discretion which cannot be circumscribed by a court except insofar as specific investigative demands infringe unreasonably on legally protected rights of individuals. *Cf. In re Petition to Compel Testimony of Tuso*, 73 *N.J.* 575 (1977) (finding that order for witness to testify before grand jury was proper exercise of Attorney General's broad authority to investigate and prosecute crimes; court could not substitute its judgment for the Attorney General by determining that the State did not need the information or the testimony sought).

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In the course of these proceedings, the State "request[ed] permission to submit an affidavit, *in camera*, which [would state] the reasons for the investigation and establish[] the nexus between the investigation and the specific questions and demands made by these investigative interrogatories." In support of this request, the State filed an affidavit of a State Police officer who alleged that he was responsible for and familiar with the facts surrounding the investigation in connection with which the interrogatories were served on Doe and Roe. His affidavit states:

> [T]he disclosure of the information upon which this investigation is based would compromise this investigation and other investigations into organized crime, as well as endanger the personal safety of confidential sources that are presently active in both this investigation and other investigations into organized crime. Consequently, it is essential that this information remain confidential at this point in time.

No *in camera* affidavit was submitted. However, in an apparent change of position, petitioners contended that the interrogatories should be set aside because they were targets of a criminal investigation. This argument concedes the existence of "an investigation." This is one of the statutory predicates for the issuance of the interrogatories which petitioners had argued was missing from the record. Petitioners' contention that they are the targets of a criminal investigation obviated the need for the *in camera* affidavit to show that such an investigation is in progress.

Judge Williams properly focused his attention on whether

any of the questions or document demands were unfairly oppressive because of their breadth, irrelevance to any possible subject of criminal investigation, or unnecessary intrusiveness into personal affairs. He held that the questions as ultimately modified did not suffer from any of these defects, and petitioners' omission to include the interrogatories in the record on appeal implies their acquiescence in that conclusion.

The orders appealed from are therefore affirmed.

[stamped]
I hereby certify that the
foregoing is a true
copy of the original
on file in my office

s/ R. Emilie Fox
Clerk

APPENDIX C — OCTOBER 27, 1995 EXCERPTED TRANSCRIPT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
ATLANTIC COUNTY

DOCKET NO. ATL-L-3210

A.D. #_____

TRANSCRIPT OF HEARING

IN THE MATTER OF
INVESTIGATIVE INTERROGATORIES
PROPOUNDED ON *** AND ***

SEALED TRANSCRIPT

Place: Atlantic County Civil Court House
1201 Bacharach Blvd.
Atlantic City, NJ 08401

Date: October 27, 1995

BEFORE:
HON. RICHARD J. WILLIAMS, J.S.C.

TRANSCRIPT ORDERED BY:
ANGELO R. BIANCHI, ESQUIRE

APPEARANCES:
THOMAS GOAN, JR., ESQUIRE, Deputy Attorney General
WILLIAM GICKING, ESQUIRE, Deputy Attorney General
LINDA RENALDI, ESQUIRE, Deputy Attorney General
Attorneys for the State of New Jersey

ANGELO R. BIANCHI, ESQUIRE
MARK WENCZEL, ESQUIRE

Appendix C

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[2] Colloquy

THE COURT: Thank you. Please be seated. Before I begin with this matter, I would simply like to first of all identify, not do it by name, but at least those in the courtroom so I may be sure that those present in the courtroom are all persons who have an interest in this matter.

Why don't I begin by at least asking counsel, even before you identify yourselves, whether you are satisfied that those in the courtroom are the only persons who have business being in the courtroom.

MR. BIANCHI: Yes, sir.

MR. GOAN: Yes.

THE COURT: Okay. All right, fine. Under the circumstances then, let me indicate that these proceedings have been sealed by the Court and will remain sealed until further

order of the Court. This is Docket Number ATL-L-3210-95 in the matter of the petition to modify or set aside investigative interrogatories propounded upon * * * and * * *

I'll ask counsel to enter their appearances for the record.

MR. BIANCHI: Angelo R. Bianchi on behalf of the petitioner, together with Mark Wenzel from my office.

MS. RINALDI: Linda Rinaldi, Deputy Attorney General.

MR. GICKING: William Gicking, Your Honor, Deputy Attorney General.

MR. GOAN: Thomas Goan, Your Honor, Deputy Attorney [3] General.

THE COURT: Counselors, in order to give some order to the proceedings, let me tell you how I would like to proceed. As I have reviewed the briefs which have been submitted, the issues raised as I understand them are as follows:

First, in the initial submission by Mr. Bianchi, there were four issues raised:

The first, an assertion that NJSA 2C:41-5 is unconstitutional, and that was — term was used in a sense which I will get clarified in a moment;

Secondly, that the investigative interrogatories are a violation of Mr. * * * right to be free from unreasonable searches and seizures pursuant to the Fourth Amendment;

Third, that the investigative interrogatories violate Mr. * * * right to due process of law;

And, fourth, that the investigative interrogatories violate Mr. * * * right to be free from self-incrimination.

There were subsequent issues raised in reply briefs and raised in the reply brief was the issue of the investigative interrogatories being improper if they were directed to a target of an investigation.

And then there is, last of all, an issue that comes [4] up in context with both the Fourth Amendment, as well as the statutory requirements under RICO, basically that the investigative interrogatories are overbroad, unduly burdensome, and unreasonably intrusive.

Let me inquire at least at the outset before we get into argument, Mr. Bianchi, are there — have I correctly identified the issues that you have raised, or are there others that I have not identified?

MR. BIANCHI: I believe you have, Your Honor. In relation to the second submission, it was not a reply brief, it was a supplemental —

THE COURT: I'm sorry.

MR. BIANCHI: — submission.

THE COURT: I mischaracterized it.

MR. BIANCHI: Then there was a subsequent brief filed by the Government, by the State. We filed a reply to that. And then there was another one filed.

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THE COURT: Right. I have — yes.

MR. BIANCHI: I believe you've covered them all in the general terms in which they were raised.

THE COURT: All right. The reason I do that is because I will tell you how I would like — how I would like to proceed at this point. What I would like to do then is deal with all issues, at least preliminarily, but the last, that the interrogatories are overbroad, unduly burdensome, and [5] unreasonably intrusive. I will come back to that.

In essence what I want to deal with then are the first unconstitutional claim;

Secondly the assertion that Mr. * * * Fourth Amendment Rights have been violated;

Third, that Mr. * * * due process rights have been violated;

Fourth, that Mr. * * * Fifth amendment Right to, and Fourth Amendment — I'm sorry, Fifth and Fourteenth Amendment Rights, self-incrimination, have been violated;

And then also that the investigative interrogatories are improper when directed to a target.

So, I'd like — I will hear Mr. Bianchi with regard to those and then I will hear the state in terms of its response. And I'll give everyone an opportunity to respond to each other as we go.

I will hold them until after we have dealt with those issues,

the issue that may take us into specific interrogatories with regard to overbroad and so on, I'll come back and deal with that, give everybody a chance appropriately.

Mr. Bianchi, we'll hear you first. And the first question I have to ask you, if I might, and then I will listen to you, with regard to your first argument that NJSA 2C:41-5 is unconstitutional, the argument you begin at page 3 of the original petition, which you have given so that I understand [6] that, my question to you is, what constitutional provision, State or Federal, do you assert is violated by these. And separate and apart from your Fourth and Fifth and Fourteenth Amendment arguments that you assert in the other things. Insofar as the first claim that 2C:41-5 is unconstitutional, what constitutional provisions are you referring to?

Bianchi — Argument

MR. BIANCHI: Your Honor, I'm referring to the Fifth, Sixth, fourteenth Amendments of the United States constitution and I guess they all work in. And what Your Honor has indicated, they fall within the purview, the broad scope of the purview.

First of all, the question of due process: I submit that the Statute in question is an extraordinary Statute that permits, in essence, a governmental body, an investigatory governmental body, a criminal investigatory and governmental body to, in essence, have an office subpoena. To go to a citizen and say, look, you provide me with all this information because I believe — we think there might be something — you've done something wrong. So, you give us everything that we want and you respond to those questions without any, I submit, the

protection that would be afforded to an individual who had been subpoenaed before a grand jury, without the rights and protection an individual would have in reference to the taking of his property without due process of law, namely a search warrant, which would have to have been passed by — made [7] by a judicial determination as to probable cause.

In essence, what we have here is all of the individual rights that a person has under our Constitution, in every form, is being violated. And, Your Honor, there were a number of cases that were cited and I believe Your Honor — I'm sure Your Honor has read those cases. And in particular, those cases which distinguish between what is called an office subpoena and a grand jury subpoena. And we have the *Hilltop* case as one of a number cases that are cited therein.

So, when I say it's unconstitutional, it is given a power to the Attorney General that, I submit, violates all of the rights of an individual that an individual has under both the New Jersey and United States constitution.

Now, when we look at this —

THE COURT: That's what I'm trying to find out. I understand your — I understand — maybe to put it differently. I'm trying to understand how argument one differs from arguments two, three or four which you make in your brief. You've drawn a distinction.

MR. BIANCHI: Your Honor, they're all intertwined.

THE COURT: Well, I know they may be intertwined. But I assume they're different because you've made a separate

distinction. And in each of the others, you've referred to a specific constitutional provision.

In the first argument that you've raised on pages 2 [8] and 3, there is no specific constitutional provision. So, I'm trying to find what the standard is that I am to look at with respect to your first argument, what I'll call the general unconstitutional argument. I'm not — I'm not sure I understand the nature of that argument.

You cite *Hilltop.* But *Hilltop* didn't deal with a constitutional question.

MR. BIANCHI: Let me be more specific there because I thought Your Honor was restricting me and don't go into due process. I say this Statute —

THE COURT: Oh, no, no, no, no. But you're going to get — I assume — you've talked about due process, have you not, under your argument three.

MR. BIANCHI: Yes.

THE COURT: Okay.

MR. BIANCHI: That's due process of Mr. * * *.

COURT: Right. Okay.

MR. BIANCHI: I am now arguing due process under the Statute. That this Statute does not give due process to anybody.

THE COURT: All right. And in what respect doesn't it give due process?

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MR. BIANCHI: And it does not give due process because there is no provision for notice of a witness if the Attorney General wants to petition the Court for an order to [9] compel compliance with the interrogatories that it serves.

There is no provision for, I respectfully submit, the notice to the witness that the attorney general is going to petition.

The fact that we're here today doesn't change the Statute. The Statute doesn't provide a notice. There's no notice provision in the Statute. So, hence, the Statute is violative of due process. And that's on the scope of the Statute in and of itself.

And it also violates a witness' right to privacy and to be protected from that individual's proprietary, participatory, or possessory interest. Any individual.

So, for those reasons, I submit it violates due process.

And another reason I will raise to the Court, while it falls within the purview of other arguments that I raised, an individual has a right, who is a target of an investigation, has a right to be told that he is the target of the investigation.

Here, the only way we're going to glean that is from facts and circumstances that are peculiar to this case. But the Statute does not provide that he is to be so informed, despite the fact the Legislature, when they had their Committee hearing, and your Honor is aware they had this hearing and had it transcribed in order that we'd no longer have any problems, [10] when the Legislature was considering this Statute, it asked specifically of

the Deputy Attorney General who was handling this, Mr. Sapienza, who dealt with why this particular process was constitutional and why it should be permitted, he was asked this question: Is there any notification up front that this person is a target. And his answer to the committee was, yes, sir. Well, I submit it's not there.

THE COURT: well, now let me ask, does the fact that the Statute doesn't provide for notification with regard to target status, does that make the Statute defective or does it mean differently? And, quite frankly, I have gone back to reread *Sarcone,* which deals with grand jury issues.

MR. BIANCHI: Right.

THE COURT: And it raised an interesting question: Does it make the Statute unconstitutional, Mr. Bianchi, or does it mean that if Mr. * * * answers those questions fully, that, in fact, any indictment that could be returned based upon answering those questions would be subject to dismissal?

MR. BIANCHI: Well, when I — I'm dealing with the issue of the Statute, Your Honor.

THE COURT: I understand. But —

MR. BIANCHI: I am not dealing with the issue of if Mr. * * * answers those questions —

THE COURT: Right. Well, there is no requirement, is there, that other than *Sarcone,* that a person be told they're a [11] target before they go before the grand jury. What exists is a remedy if they're not told, isn't that so?

MR. BIANCHI: See, but what I want to bring to the Court's attention is I consider this entire proceeding under the Statute not akin to any other type of proceeding we have. Not akin to any other judicial proceeding that we have where there's a protection by a judge. Not akin to a grand jury proceeding where there is still protection, despite the fact that the prosecutor contends, in essence, that they own the grand jury.

THE COURT: Right. Well, how about akin to an Antitrust proceeding where civil interrogatories are served? I think —

MR. BIANCHI: Well — go ahead.

THE COURT: No, go ahead. Maybe they call them differently than interrogatories. I think they're civil — well, it will come to me. But it's a little different name, it's the same creature.

MR. BIANCHI: Well, as I — as I recall, Your Honor, I don't think it's the same situation, such as this. Because this is criminal in nature. Antitrust can be civil solely in nature, not criminal in nature. This Statute provides an extraordinary remedy for what is called racketeering where people who have done something maybe 10 or 15 years ago, if they have two predicate acts over a course of a period of time, [12] you can be indicted for a very serious crime. That's completely different than an Antitrust investigation where you may suffer some financial penalties.

And, of course, Your Honor is aware when you look through the proceedings before the Committee, that all of the representation is by — Mr. Sapienza, the Attorney General, and also Governor's counsel, was that in those cases, they're always

sent to third parties, they're never sent to targets. They're sent to a third party to get some information concerning someone that something they may suspect is wrong.

But I submit there's a distinction. There is a distinction because this has a criminal penalty with a very serious criminal imprimatur placed upon any violation. So, this is a filius nullius, if I can use that expression.

THE COURT: You're welcome to. I don't understand it, but you're welcome to use it.

MR. BIANCHI: Child of no one.

THE COURT: Thank you.

MR. BIANCHI: And as Mr. Kern said, it's an extremely hybrid situation. That's an old Latin term, Your Honor, that we had law school, as I remember it.

THE COURT: I know, but I'm not an old Latin. Go ahead.

MR. BIANCHI: Well, no, not that I'm an old Latin, although I am an old Latin. It's because they had that in law [13] school, we'll continue on.

So, there is the distinction, Your Honor. There lies the distinction. This is an extraordinary situation. And I say that when you have an extraordinary situation like this, the fact that if someone is a target, he should be told he's a target. And if he's not told he's a target, I submit, it violates due process.

And it also, as I said, violates your right of privacy and the right to be free in his participatory, possessory and proprietary interests. Here we have a situation where the Government comes in, the State comes in and says, without any court determination that there is a probable cause for this, I want all of your company's records, which you are the principal, that owe 90 some odd percent of the company, I want all of your records from the inception of your corporation from 1978 until today.

Now, I know that goes into the question of burdensome, but I am talking about the intrusion of that and the effect that has upon the proprietary interest, I submit, are of a constitutional nature.

THE COURT: You're arguing that, I assume, under your Fourth Amendment issue, which is the second one that you've raised.

MR. BIANCHI: Well, yes, Your Honor. But, again, as I say, in light of the extraordinary nature of this, I have [14] to — when you say why is it unconstitutional. The Statute, per se, is distinguished from the application of the Statute to a particular individual.

THE COURT: Well, it's unconstitutional because it violates some provision of the Constitution, one or more.

MR. BIANCHI: Right.

THE COURT: And my question simply is, for whichever one or more it focuses on, I'd like to just focus on that one, and then that one, and then that one. In essence, something — if it is unconstitutional, there are specific provisions of the Constitution that it violates. All I want to do is be sure that I

understand your argument as to which the provisions are and then how you assert that they are violate.

MR. BIANCHI: Well, I gave you the due process violation and lack of notice. I submit. And I gave you the rights to privacy situation.

I gave you further , most respectfully, the fact that in light of this, what we have — what we are doing now, in essence, is going back in time to, in essence, a star chamber proceeding where the Government can say or the authority can say, you give me everything, we'll look at it and we'll decide what we're going to do with you. Without any judge having to say anything. Because I submit, they could do that if — because this Statute doesn't provide the right to the notice to the witness if he doesn't comply.

[15] THE COURT: Now, could they bring these witnesses before the grand jury and ask them all these same questions?

MR. BIANCHI: They could bring them before the grand jury, but, again, as an old practitioner under the aegis of Governor Byrne and Joe Lordi, I know that when we were there, we had a grand jury that would ask questions. And we had a grand jury that would stop us. And by the same token, we had a grand jury that we wouldn't attempt to abuse what would occur before them and bring something like this. But could that happen? Yes. But you have the protection of the grand jury. You have an intervening body in between the citizen and the State, just as —

THE COURT: Well, how does the grand jury intervene if the prosecutor issues the subpoena and the person is directed to appear before the grand jury with the documents?

MR. BIANCHI: He — the grand jury — the documents have to go to the grand jury. And I submit the grand jury could say to the prosecutor, we want to look at these before we even let you look at them. They have that authority and they have that right. And if we decide that we don't want to use these, we're not — because we think they're personal to this individual, we're not going to let you have them. I don't know whether that's ever happened, but I submit the grand jury has that right.

As a matter of fact, the foreman of the grand jury [16] can tell the prosecutor to get out of the court — get out of the grand jury.

THE COURT: Well, let me ask, then, with regard to everything asked for in these interrogatories, do you acknowledge then that if the State went before a grand jury and the grand jury issued this same demand, that your clients would be obligated to produce all of these matters and answer all of these questions?

MR. BIANCHI: They would be — no, not required to answer all the questions. They would —

THE COURT: Well, unless they assume — assumedly they, let's say, a Fifth amendment right, but that aside.

MR. BIANCHI: I — but when you say would they have a right, they would have a right to produce them to the grand jury.

MR. BIANCHI: There's no doubt about it. But this isn't an office subpoena then. And that is what is dangerous about the whole situation. And that is what is dangerous about, I respectfully submit, this provision, that I submit our legislators were seriously concerned about his constitutionality. And I know, Your Honor, having heard you before, I'm sure you read every page and every word in that Committee report. And I'm sure it's clear in your mind.

So —

* * *

[27] . . . standard. It gives them the right to ask a citizen investigatory interrogatories by — with a mere showing — with a mere statement that they have suspicion. And I submit that doesn't fall within the purview of the Fourth Amendment. The Fourth Amendment hangs itself on more than suspicion. It hangs itself on probable cause, on reasonable grounds to believe that a crime has been committed, not on suspicion.

And this is, again, the danger and the disease of this particular Statute. Because the Attorney General says, well, we believe that you've done something wrong. We believe that you know Fat Harry, Harry the Fish, or whoever in the heck else they've got in these broad interrogatories. And as a result of that, you have a business and you're making —

THE COURT: I don't know that's in there. But don't suggest any more names or they might get in there.

MR. BIANCHI: Well, they could get there because I don't know who they are, I'm making them up, Judge.

THE COURT: All right. I assumed that.

MR. BIANCHI: But — and you also will note that I did not give you any names that end in a vowel.

THE COURT: Harry ends in a Y, but go ahead.

MR. BIANCHI: So as I say, Your Honor, that, again, renders this Statute outside the purview of the Fourth Amendment and due process under the Fourth Amendment and the Constitution, paragraph 7, of our New Jersey State . . .

* * *

[54] Rinaldi — Argument

. . . what authority is there to require somebody to — I can understand answering and producing documents, what authority is there to require somebody to appear and furnish testimony in the Attorney General's Office?

MS. RINALDI: Well, Your Honor, we would submit that Section C of the Statute, perhaps, would give us authority to have someone come and provide testimony. It says, "No interrogatory shall contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued in aid of a grand jury investigation."

It's not unreasonable to have someone come before a grand jury and testify.

However, I'm not sure that the — when these interrogatories — when this investigative interrogatory was served, I don't

believe it was our intendment to have * * * come and answer the 291 questions in person.

THE COURT: I understand that. But before the Attorney General goes out, I mean this is not an every day occurrence, I assume, issuing investigative interrogatories.

MS. RINALDI: Absolutely not.

THE COURT: My question is, don't you think that the Attorney General's Office ought to be a little more precise and particular? There's nothing in the legislative history that suggests that anybody was ever required to appear before — in the Attorney General's office and, in effect, give oral . . .

* * *

[56] . . . their office and give testimony?

MS. RINALDI: I don't believe it's been used, no. That's the —

MR. GOAN: Judge, if I may, the form's been used, but we normally don't compel appearance. We — our intent is to get the answers and the material that we need.

THE COURT: Well, a citizen getting this wouldn't know that. A citizen getting this might not know it at all. I mean there's some concern for me as to whether — whether this affects this case or not is another matter.

But certainly in terms of — if this is the printed document going out over the signature of the Deputy Attorney General,

having with it all the authority of the State, the normal ordinary citizen might very well not know that they don't have to appear in an office and give testimony.

The other — the description you gave of the investigation, which was something to the effect an investigation — furnish information and testimony deemed necessary in connection with the enforcement of the New Jersey Racketeering law, said conduct allegedly consisting of the control and financing of *** and its owner, *** — *** I'm sorry, I hope I'm pronouncing it correctly, by organized crime. Is that a violation of any of the RICO sections?

MS. RINALDI: The nature of that specific . . .

* * *

[62] . . . have the Court protect his interests if he thinks the questions or the document demand is too unreasonable or too vague or too overbroad or too whatever it is.

So, in the legislative history itself, I highlighted certain portions, too. And along the way, they keep saying we're going to counterbalance both sides. There is not going to be a bill unless we're assured that a person receiving its investigative interrogatories is protected.

And the Attorney General would submit that going from the legislative history to the fact that the Statute has been enacted shows that the concerns that were raised for Constitutional Rights, abusive — the Attorney General in using these investigative interrogatories has been satisfied by Sections (b) through (j) of 41-5.

Appendix C

In addition, 41-6 also provides some safeguards. 41-6 sets forth certain sections of Chapter 41, which are to be liberally construed. 41-5 is not one of them.

However, nowhere in the Chapter, I believe, does it say 41-5 must always be strictly construed. And we would submit that that is the case because it is very difficult, just as you pointed out by why does it say in general language here what the nature of the investigation is. At an early state of investigation, it is very difficult to precisely say what it is you need to know.

And if everything had to be strictly construed, . . .

* * *

APPENDIX D — EXCERPTED TRANSCRIPT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART, ATLANTIC COUNTY, DATED FEBRUARY 23, 1996

SUPERIOR COURT OF NEW JERSEY LAW DIVISION,
CIVIL PART ATLANTIC COUNTY

DOCKET NO. ATL-L-3693-95

A.D. #

IN THE MATTER OF

JOHN DOE and ROE CORPORATION

TRANSCRIPT
OF ORAL ARGUMENT OF
MOTION OF OBJECTIONS TO
INVESTIGATIVE INTERROGATORIES

SEALED TRANSCRIPT

Place: Atlantic County Civil Court House
1201 Bacharach Blvd.
Atlantic City, NJ 08401
Date: February 23, 1996

BEFORE:

HON. RICHARD J. WILLIAMS, J.S.C.

TRANSCRIPT ORDERED BY:

ANGELO R. BIANCHI, ESQUIRE

Appendix D

APPEARANCES:

THOMAS GOAN, JR., ESQUIRE, Deputy Attorney General
WILLIAM GICKING, ESQUIRE, Deputy Attorney General
LINDA RENALDI, ESQUIRE, Deputy Attorney General
Attorneys for the State of New Jersey

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* * *

[44] . . . individuals and/or entities to which * ** or any member of his immediate family is financially indebted. First of all, immediate family, he says, is not clear or to put it differently, specific in directive as the case law would require; and secondly, that it may be unduly — unduly burdensome in that people may be financially indebted to a lot of different people. So insofar as the members of his family, I have no idea how many members of his — of however you define inmediate

family, however many members he may have and does that include credit card debts, does that include overdue library books. I mean, what kind of debts are you talking about?

MR. GOAN: Judge, it includes all debts and the reason for that is because we don't know — we don't know how that indebtedness may be relevant. Organized crime operates in a clandestine —

THE COURT: Well, let me stop you right there. If you can't tell me how it's relevant, then please tell me why you're entitled to get it?

MR. GOAN: Well, it's relevant, Judge, because certain of those debts might be money borrowed to finance and control the company.

THE COURT: I understand — I understand that. You have to show something relevant purpose. What my problem is, is that I understand that you want to know something about

* * *

[140] . . . much as it may be involved in his operation of his company, the direct control and financing of . . . The company could be financed through loan company — loan sharking. We don't know, but it could be.

THE COURT: Yes. But I'm just going to — supposing he says, my understanding of the meaning of loan sharking is that you put out loans at usurious rates, what's that do for you?

MR. GOAN: Then he's answered the question, Judge.

THE COURT: I understand that. He's answered the question. How's it relevant?

MR. GOAN: Judge, I think it's relevant in as much as he's discussing loan sharking at the Pomaboy Social Club. I want to know what the term loan sharking means to him.

THE COURT: I know. But you keep telling me I want to know. The fact that you want to know doesn't make it relevant, all right. What I want to know from you is how is it relevant? Let's assume he answers the question and he says — and he gives you a nice — in fact, you know, he even goes to the criminal code and he gives you a verbatim thing that describes loan sharking. What does — what's that got to do with — that kind of a general question got to do with the investigation?

MR. GOAN: Judge, it's all tied to organized crime.

THE COURT: But tell me the relevance. That's what I'm having — I'm struggling. I can understand some of these

* * *

APPENDIX E — ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ATLANTIC COUNTY FILED MARCH 26, 1996

DEBRA T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent
State of New Jersey, Division of Criminal Justice

By: William R. Gicking, Deputy Attorney General
Thomas W. Goan, Deputy Attorney General
State of New Jersey, Department of Law and Public Safety
Division of Criminal Justice
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — ATLANTIC COUNTY
DOCKET NO. ATL-L-3693-95

IN THE MATTER OF JOHN DOE

AND ROE CORPORATION

ORDER

THIS MATTER coming before the Court through the Petition of Angelo R. Bianchi, Esq. for an Order Modifying or Setting Aside Investigative Interrogatories which were served upon Petitioners' John Doe and Roe Corporation, a New Jersey corporation, under New Jersey's RICO Statute, *N.J.S.A.* 2C:41-1 *et. seq.*, and the Court having considered the matter with respect to both John Doe and Roe Corporation, and the Court

having stricken certain interrogatories, and certain interrogatories having been modified, and the State of New Jersey having withdrawn certain interrogatories, and the Court having determined that both John Doe and Roe Corporation must answer the interrogatories as modified and annexed to this Order, and for good cause shown;

IT IS on this 26th day of MARCH 1996

HEREBY ORDERED that:

1. John Doe shall furnish Answers to the Investigative Interrogatories annexed hereto fourteen (14) days from the date this Order is signed.

2. IT IS FURTHER ORDERED that Roe Corporation shall furnish answers to the investigative interrogatories annexed hereto within fourteen (14) days from the date this Order is signed.

3. IT IS FURTHER ORDERED that Roe Corporation shall make available at is offices located in Bethel, Connecticut all of the records specified in the Investigative Interrogatories, Schedule A, annexed hereto, and Roe Corporation will permit representatives of the State of New Jersey to inspect and copy the specified records. The records shall be gathered and made available within fourteen (14) days from the date this Order is signed and shall remain available until such time as the State completes its inspection and copying.

4. IT IS FURTHER ORDERED that Roe Corporation shall permit to State to remove original documents as deemed necessary by representatives of the State of New Jersey. In the

event the State takes possession of original documents, the State shall provide the Roe Corporation with a legible photocopy.

5. IT IS FURTHER ORDERED that this matter shall remain under seal until further order by this Court.

s/ Richard J. Williams
Richard J. Williams, A.J.S.C.

APPENDIX F — EXCERPTED PETITIONERS' APPELLATE BRIEF DATED SEPTEMBER 9, 1996

IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-4643-95TI

Civil Action

In The Matter of

JOHN DOE and ROE CORPORATION,

Petitioners/Appellants.

On Appeal From:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — ATLANTIC COUNTY
Docket No. ATL-L-3693-95

Sat Below:

Honorable Richard J. Williams, A.J.S.C.

BRIEF ON BEHALF OF PETITIONERS /APPELLANTS JOHN DOE AND ROE CORPORATION

Appendix F

* * *

PROCEDURAL HISTORY

On July 26, 1995, Detective David Grusemeyer of the New Jersey State Police served upon John Doe and Roe Corporation ("Doe and Roe" or "Petitioners") Investigative Interrogatories returnable September 11, 1995 (Pa 69). The State subsequently extended the return date until September 18, 1995 (Pa 68). The State demanded that John Doe and Roe Corporation answer 291 interrogatories and produce all of Roe Corporation's records from May 11, 1978 to the present (Pa 71).

On September 12, 1995, John Doe and Roe Corporation filed a Petition to Modify or Set Aside the Investigative Interrogatories pursuant to ***N.J.S.A.*** 2C:41-5j (Pa 56). On October 27, 1995, the Honorable Richard J. Williams, A.J.S.C., conducted a hearing to consider the Petitioners' constitutional challenge to the Investigative Interrogatories (1T)[1]. By Opinion dated January 31, 1996 (Pa 24) and Order dated February 13, 1996 (Pa 22), Judge Williams rejected Petitioners' challenge to the constitutional and statutory validity of the Investigative Interrogatories and ordered the scheduling of further proceedings to address Petitioners' claims that the Investigative Interrogatories were overbroad and unduly burdensome. Said additional hearings, which were held on February 23, 1996

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1. Transcripts are identified as follows:

1T = October 27, 1995 hearing	6T = April 9, 1996 hearing
2T = February 23, 1996 hearing	7T = April 17, 1996 hearing
3T = February 26, 1996 hearing	8T = April 23, 1996 hearing
4T = March 26, 1996 hearing	9T = May 15, 1996 hearing
5T = March 28, 1996 hearing	

and February 26, 1996 (1T; 2T), culminated in the Court's Order dated March 26, 1996 modifying the interrogatories and establishing a new return date fourteen (14) days from the date of the Order (Pa 14).

On April 17, 1996, the State, pursuant to ***N.J.S.A.*** 2C:41-5i, obtained an Order to Compel Answers to Investigative Interrogatories, ordering John Doe and Roe Corporation to give the State answers to the Investigative Interrogatories and to make available for inspection by the State the records of Roe Corporation (Pa 10).

The Petitioners filed a Notice of Appeal to the Superior Court, Appellate Division, on April 23, 1996 (Pa 1).

STATEMENT OF FACTS

The State propounded the Investigative Interrogatories upon Doe and Roe pursuant to the New Jersey Racketeering Statute, ***N.J.S.A.*** 2C:41-1, ***et seq.*** The specific authorization to issue the Investigative Interrogatories is set forth in ***N.J.S.A.*** 2C:41-5. The statute provides in pertinent part:

Investigative Interrogatories

> a. Whenever the Attorney General determines that there exists a reasonable suspicion that any person or enterprise may have information or be in possession, custody, or control of any documentary materials relevant to an investigation under this chapter, or whenever the Attorney General believes it to be in the public interest that an investigation be made pursuant to this chapter, he may, prior to the

institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon the person, an investigative interrogatory requiring him to answer and produce material for examination.

b. Each interrogatory shall:

(1) State the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable thereto;

(2) Advise the person that he has the right to discuss the interrogatory with legal counsel prior to returning it to the Attorney General or prior to making material available as provided hereinafter in subsection f. and that he has the right to file in Superior Court a petition to modify or set aside the interrogatory pursuant to subsection j. hereinafter;

(3) Describe the class or classes of documentary material to be produced thereunder with such specificity and certainty as to permit the material to be fairly identified;

(4) Prescribe a return date which will provide a reasonable period of time within which answers may be made and material so demanded may be assembled and made available for inspection and copying or

reproduction as provided hereinafter in subsection f.

c. No interrogatory shall:

(1) Contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued in aid of a grand jury investigation; or (2) Require the production of any documentary evidence which would be otherwise privileged from disclosure if demanded by a subpoena duces tecum issued in aid of a grand jury investigation.

* * *

f. Any person upon whom any interrogatory issued under this section has been duly served which requires the production of materials shall make the material available for inspection and copying or reproduction to the Attorney General at the principal place of business of that person in the State of New Jersey or at such other place as the Attorney General and the person thereafter may agree and prescribe in writing, on the return date specified in the interrogatory or on a later date as the Attorney General may prescribe in writing.

* * *

Any person who shall disclose to any person other than the Attorney General or a person retained by

the Attorney General as set forth above, the name of any person who receives an investigative interrogatory or any information obtained pursuant thereto, except in proceedings involving an alleged violation of this chapter and except as so directed by the Attorney General shall be guilty of a crime of the fourth degree.

* * *

i. Whenever any person fails to comply with any investigative interrogatory duly served upon him under this section or whenever satisfactory copying or reproduction of any material cannot be done and the person refuses to surrender the material, the Attorney General may file in the Superior Court a petition for an order of the court for the enforcement of this section.

j. At any time before the return date specified in the interrogatory, such person may file in the Superior Court a petition for an order modifying or setting aside the interrogatory. The time allowed for compliance of the interrogatory, in whole or in part as deemed proper and ordered by the court, shall not run during the pendency of such petition in the court. The petition shall specify each ground upon which the petitioner relies in seeking relief, and may be based upon any failure of the interrogatory to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the petitioner. In such proceeding the Attorney General shall establish the existence of an

investigation pursuant to this chapter and the nature and subject matter of the investigation.

N.J.S.A. 2C:41-5.

Three aspects of the above statute are especially relevant to this appeal. First, the recipient of an Investigative Interrogatory may: "[a]t any time before the return date specified in the interrogatory. . .file in the Superior Court a petition for an order modifying or setting aside the interrogatory." ***N.J.S.A.*** 2C:41-5j. Once a petition to modify or set aside an interrogatory is filed, the time allowed for compliance with the interrogatory is tolled, and the Attorney General must "establish the existence of an investigation pursuant to this chapter and the nature and subject matter of the investigation." ***Id.*** Second, when a witness fails to comply with an Investigative Interrogatory, the statute permits the Attorney General to file in the Superior Court a petition for an order enforcing ***N.J.S.A.*** 2C:41-5. ***See N.J.S.A.*** 2C:41-5i. Third, the statute mandates that any investigation conducted pursuant to ***N.J.S.A.*** 2C:41-5 be kept confidential. ***N.J.S.A.*** 2C:41-5f.

In the instant matter, the Investigative Interrogatories were accompanied by a cover sheet which advised Doe and Roe that the interrogatories were deemed necessary to the "enforcement of the New Jersey Racketeering Law ***N.J.S.A.*** 2C:41-1 ***et seq.***," and were designed to inquire into the suspected "Control and Financing of [Roe Corporation] and its owner, [John Doe] by Organized Crime." (Pa 69). Annexed to the cover sheet were two sets of 291 questions, many with subparts, to be answered by John Doe and Roe Corporation (2T, 5) and a document demand requiring the production of all of Roe Corporation's records from May 11, 1978 (the date of its incorporation) to

the present (Pa 71). The document demand was unlimited, requiring the production of every document utilized by Roe Corporation in the operation of its business.

The Petitioners were given until September 18, 1995 to provide answers to, and to produce the documents demanded within, the Investigative Interrogatories (Pa 68). Prior to the expiration of the time allowed for compliance, the Petitioners met with the Attorney General's Office to discuss the State's investigation. The parties could not reach agreement and, on September 12, 1995, the Petitioners filed a petition to modify or set aside the Investigative Interrogatories pursuant to ***N.J.S.A.*** 2C:41-5j (Pa 56). Notwithstanding the express provision of ***N.J.S.A.*** 2C:41-5j, that upon the filing of a petition to modify or set aside the time allowed for compliance with the interrogatories shall not run, the State sought to preempt petitioners' ***N.J.S.A.*** 2C:41-5j petition by filing a petition to compel answers to the interrogatories pursuant to ***N.J.S.A.*** 2C:41-5i on September 13, 1995 (Pa 49). When the State filed its papers with the Court, it was met at the courthouse by a reporter from Fox Television. Later in the proceedings, the Court noted that Assistant Attorney General Michael Bozza had informed the Court that the reporter previously worked with the Division of Criminal Justice as a public information officer (6T 8:7-22).

The Court subsequently dismissed the State's Petition as premature (Pa 47).

Doe and Roe's petition for relief was heard by the Honorable Richard J. Williams, A.J.S.C. Prior to conducting any hearings in the matter, Judge Williams sealed the proceedings pursuant to subsection (f) of ***N.J.S.A.*** 2C:41-5 (Pa 16). Notwithstanding

the Court's sealing order and the protective provisions of ***N.J.S.A.*** 2C:41-5f, the lower court proceedings were not kept confidential (2T 15). From the start of these proceedings, the media was apprised of the existence of the investigation and the identity of the Petitioners. This fact was made irrefutable by a certain article that appeared in the Philadelphia Inquirer on March 26, 1996 wherein the existence of the investigation and the Petitioners' identities were made public (Pa 79). Petitioners' counsel made numerous objections to the existence of these leaks and requested the Court and the State to take the actions necessary to stop the leaks (2T 8; 4T 4-12). By letter dated March 26, 1996, the Court noticed the Attorney General of the breach of the Court's sealing order and the violation of ***N.J.S.A.*** 2C:41-5f (Pa 16). On the same day, however, the Court accommodated the press by releasing its January 31, 1996 Opinion to the Philadelphia Inquirer (Pa 12). The Court released its opinion, notwithstanding the vigorous objection of Petitioners' counsel (4T 10:11) and the State's agreement that "at this point it might be best not to release the Opinion. . ." (4T 12-20). Despite the leaks and Petitioners' counsel's request that the Attorney General's office conduct an investigation pursuant to ***N.J.S.A.*** 2C:41-5f, the State took no steps to investigate the source of the leaks (4T 13; Pa 74). After the release of the Court's Opinion, the Philadelphia Inquirer published another article with additional information that had been culled from the Opinion, namely, that the purpose of the investigation was to investigate the alleged control and financing of Doe and Roe Corporation by organized crime and that Doe and Roe had argued that they could not be compelled to answer the State's questions because they were the targets of the investigation (Pa 75).

Because of the leaks and the consequent substantial damage suffered by John Doe and Roe Corporation, and the failure and

refusal of the Attorney General to conduct an investigation into said leaks, Petitioners did not furnish the State with answers to the Investigative Interrogatories by the return date set by the March 26, 1996 Order of the Court. Instead, Doe and Roe petitioned the Court for the sanction of dismissal of the Interrogatories based upon: (1) the media leaks; (2) the irreparable harm suffered by Petitioners as a result; (3) the Attorney General's failure to conduct an investigation; (4) the almost certain additional irreparable harm that would result to Petitioners by future leaks of the information to be disclosed in the answers to the interrogatories; (5) the express language of *N.J.S.A.* 2C:41-5j providing that the Petitioners may petition the Court for an order setting aside the Investigative Interrogatories "based upon any failure of the interrogatory to comply with the provisions of this section or upon any constitutional legal right or privilege of the petitioner"; (6) the fact that at the meeting conducted at the inception of the investigation, Assistant Attorney General Michael Bozza stated to Petitioners that he would prefer settling this matter without going public, as once the information was made public, it would hurt John Doe and Roe Corporation (6T 7:6-11); and (7) the fact that when the State filed its premature papers to compel compliance with the Investigative Interrogatories with Judge Williams, it was welcomed by a television reporter who, by no small coincidence, had previously worked with the Division of Criminal Justice as a public information officer (6T 8:7-22).

By Order dated April 22, 1996, the Court denied Petitioners the relief requested (Pa 9). The State then petitioned and received from the Court an Order Compelling Answers to Investigative Interrogatories, pursuant to *N.J.S.A.* 2C:41-5i, on April 17, 1996 (Pa 10). The Court adjudged the April 17, 1996 Order final for purposes of appeal (7T 6:24-7:4). The

State initially accepted the Court's determination that the order to compel would be deemed final for purposes of appeal (7T 7:20-24), but subsequently moved the Court to reconsider the Order's finality (8T 2). After hearing argument on the State's motion, the Court issued supplemental Order dated April 23, 1996, imposing coercive sanctions upon Petitioners and adjudging said Order final for purposes of appellate review (Pa 77-78).

The final proceeding before Judge Williams occurred on May 15, 1996. The proceeding was instituted both by the Petitioners and the State. The Petitioners sought again to have the interrogatories stricken on the basis of certain newly discovered evidence which was set forth in the State's affidavits to the Appellate Division and Supreme Court in response to the Petitioners' applications for a stay of the April 17, 1996 Order Compelling Answers To Investigative Interrogatories. The evidence indicated that much of the information purportedly sought by the State via the Investigative Interrogatories was already within the State's possession (9T 11-16). For example, the State submitted a letter to the Supreme Court in its appendix that had been written by John Doe on behalf of a Mr. Petrizzio. In the letter, John Doe states how long he's known Mr. Petrizzio. One of the interrogatory questions propounded by the State asks John Doe whether he knows a Mr. Petrizzio and if so, for how long he has known him (9T 13:16-24). It was argued by Petitioners that the State was using the interrogatories for the improper purpose of manufacturing a false swearing action against Petitioners (9T 16:5-13). Petitioners argued that the Investigative Interrogatories were not propounded in accordance with the intendment of ***N.J.S.A.*** 2C:41-5 and, as such, should have been stricken (9T 19:21-20:1). The Court did not find the State's use of the interrogatories to be improper or outside the intendment of the statute (9T 31:17-33:4).

Appendix F

The State sought to have additional sanctions imposed against the Petitioners for their failure to answer the interrogatories but its application was mooted by Petitioners' assertion of their Fifth Amendment right not to answer same in view of their status as the target of the investigation (9T 38:22-44:9).

LEGAL ARGUMENT

POINT I

THE INVESTIGATIVE INTERROGATORIES PROPOUNDED UPON JOHN DOE AND ROE CORPORATION PURSUANT TO *N.J.S.A.* 2C:41-5 VIOLATE DOE AND ROE'S RIGHT TO A ZONE OF PRIVACY FREE FROM UNREASONABLE GOVERNMENT INTRUSION AS GUARANTEED BY THE FOURTH AND FIFTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, AND ARTICLE ONE, PARAGRAPH SEVEN OF THE NEW JERSEY CONSTITUTION.

A. The Trial Court Misinterpreted Legal Principles Applicable to an N.J.S.A. 2C:41-5 Inquiry and Erroneously Failed to Exercise its Discretion

This appeal seeks review of the Trial Court's interpretation of *N.J.S.A.* 2C:41-5. Petitioners submit that by finding that the *N.J.S.A.* 2C:41-5 Investigative Interrogatories were propounded upon Doe and Roe in accordance with the

intendment of the statute, that the investigation was not violative of the constitutional rights asserted by the Petitioners, and that Petitioners' should be compelled to comply with the investigation, the Trial Court misapplied pertinent legal principles and misinterpreted the original intendment of the statute. As stated above, the Trial Court compelled compliance with the Investigative Interrogatories by Order dated April 17, 1996, as supplemented by Supplemental Order dated April 23, 1996. Both Orders resolved all issues pending before the Trial Court and were correctly adjudged final for purposes of appellate review. ***See R.*** 2:2-3(a)(1) (providing that appeals may be taken as of right to the Appellate Division from final judgments of the Superior Court trial divisions). Because an appellate court is not bound by a trial court's interpretation of legal principles, this Court has jurisdiction over this appeal. ***See, Kimmelman v. Henkels & McCoy, Inc.,*** 108 N.J. 123 (1987)(Trial Court's imposition of penalties under ***N.J.S.A.*** 56:9-10c based on misinterpretation of applicable law must be reversed); ***Lombardo v. Hoag,*** 269 N.J. Super. 36 (App. Div. 1993), ***cert. denied***, 135 N.J. 469 (Appellate Division not bound by Trial Court's construction of legal principles).

In addition, the Court erroneously failed to exercise its discretion to strike the investigation in its entirety, after Petitioners presented the State with substantial evidence of the State's misuse and abuse of the statute. **Alk Associates, Inc. v. Multimodal Applied Systems, Inc.**, 276 N.J. Super. 310, 647 A. 2d 1359 (App. Div. 1994) (no deference should be accorded action of trial court where court mistakenly or arbitrarily failed to exercise its discretion). For the reasons that follow, the Trial Court misinterpreted the applicable legal principles governing the Petitioners' application to modify or set aside the Investigative Interrogatories pursuant to ***N.J.S.A.*** 2C:41-5j and

erroneously failed to exercise its discretion. As such, the Trial Court must be reversed.

B. The Investigative Interrogatories Propounded Under N.J.S.A. 2C:41-5 Deprived Petitioners of the Right to Be Free from Unwarranted Governmental Intrusion.

Implicit in the Fourth and Fifth Amendments is the right to be free from unwarranted governmental invasions into one's private life. ***See, Griswald v. State of Connecticut,*** 381 U.S. 479, 484, 85 S. Ct. 1678, 1681 (1965). This well-settled right protects the citizen not merely from the gross physical invasion of one's home and private life, but protects one also from being subjected to unreasonable inspection or investigation, however conducted. Justice Bradley in ***Boyd v. United States,*** 116 U.S. 616, 6 S. Ct. 524 (1886) succinctly stated the importance of this sacred and, increasingly fragile, right. ***Boyd*** involved a provision in the United States Customs Laws which authorized a Federal Court to require an individual to produce in court his private books, invoices and papers on motion of a United States Attorney upon his belief that "any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States. . .". ***Id.*** at 526, 6 S. Ct. at 620. In finding the statute repugnant to the first principles of the United States Constitution, Justice Bradley reiterated the timeless truths of liberty stated by Lord Camden in ***Entick v. Carrington,*** 19 How. St. Tr. 1029 (1765):

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its advantitious

> circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. **It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense.** . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

Id. at 630, 6 S. Ct. at 532 (emphasis added).

In ruling upon the facts of the case before the *Boyd* Court, Justice Bradley further emphasized the interrelatedness between the Fourth and Fifth Amendments as follows:

> " 'Unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what

> is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."

Id. at 633, 6 S. Ct. 534.

Moreover, as to the disposition of the instant matter, Justice Bradley presciently stated:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but **illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right,** as if it consisted more in sound than in substance. . . . We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

Id. at 635, 6 S. Ct. at 535 (emphasis added).

Drawing from ***Boyd*** and its progeny, Justice Douglas, in writing for the majority in ***Griswald,*** stressed that the Fourth and Fifth Amendments when read in conjunction with the Ninth Amendment protects the right to privacy, i.e., to be let alone.

Griswald, supra, 381 U.S. at 485, 85 S. Ct. at 1682. The right to privacy, fundamental to our constitutional form of government, is older than the Bill of Rights itself. ***Id.*** at 486. Indeed, at the First Congress on September 25, 1789, James Madison submitted the Ninth Amendment to make clear that the Bill of Rights did not fully set forth the rights enjoyed by the people to be free from governmental intrusion. ***Id.*** at 489-490, 85 S. Ct. at 1684-85 (Goldberg, J. concurring). The Ninth Amendment was incorporated into the Bill of Rights to emphasize that the rights enjoyed by the people, some of which were enumerated in the Bill of Rights, are to be liberally construed.

Petitioners in the instant matter have no criminal record. They are thus entitled to the full measure of privacy rights guaranteed by the United States and New Jersey Constitutions. For the reasons set forth herein, the Petitioners were denied their rights to privacy and to be free from unreasonable searches and seizures.

* * *

> this case or not is another matter.
>
> But certainly in terms of — if this is the printed document going out over the signature of the Deputy Attorney General, having with it all the authority of the State, the normal ordinary citizen might very well not know that they don't have to appear in an office and give testimony.

(1T 53:23-56:15).

As evidenced by the RICO Act's liberal construction provision, ***N.J.S.A.*** 2C:41-6, which notably exempts ***N.J.S.A.***

2C:41-5, the legislature intended for a strict construction of *N.J.S.A.* 2C:41-5. Fundamental Fairness and due process mandate a strict construction of *N.J.S.A.* 2C:41-5. By not requiring the State to establish the "existence, nature, and subject matter of the investigation" when disposing of Petitioners' *N.J.S.A.* 2C:41-5j petition to modify or set aside the Investigative Interrogatories, the Trial Court did not strictly construe the statute and deprived Petitioners of substantive and procedural due process.

POINT III

THE STATE'S *N.J.S.A.* 2C:41-5 INVESTIGATION CIRCUMVENTS JOHN DOE'S CONSTITUTIONAL RIGHT TO BE HELD ANSWERABLE TO A CRIMINAL OFFENSE ONLY ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . ."

Similarly, the pertinent provisions set forth in Article 1, paragraph 8 of the New Jersey Constitution provides:

> "No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury. . ."

Appendix F

It is axiomatic that the grand jury must not be captive to any of the three branches of government for it is an institution that is older than the constitution itself; the right to be held for a crime only upon indictment or presentment predates our constitution. ***See, United States v. Chanen,*** 549 F. 2d 1306 (9th Cir. 1977), 434 U.S. 825, 98 S. Ct. 72, 54 L. Ed. 2d 83. The Fifth Amendment acknowledged the right to a grand jury but did not relegate it to a position within any of the three branches of government. The right for a civilian only to be held for a crime on the presentment or indictment of a grand jury presupposes that the grand jury will act as an unbiased investigator independent of the prosecutor or the judge. ***See, United States v. Dionisio,*** 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973); ***United States v. Hyder,*** 732 F. 2d 841 (1984); ***see, also, United States v. Provenzano,*** 440 F. Supp. 561 (S.D. N.Y. 1977).

The mission of the grand jury is a sacred one: i.e., to assure that those who may be guilty are brought to trial and that those who are innocent are not. The grand jury is "a cornerstone of the liberty of the people"; it is a right that has been secured by the people since the Magna Carta of 1215. ***Dionisio, supra,*** 410 U.S. at 27, 93 S. Ct. at 779 (Douglas, J., dissenting). The grand jury serves as a protective body of peers with no axes to grind or agency to serve, to stand as a buffer between the oppressive power of the State and the individual. ***See, Id.*** at 28, 93 S. Ct. at 764. It "is the only accusatorial body of the federal government recognized by the constitution." ***Id.; see also, Hale v. Henkel,*** 201 U.S. 43, 59, 26 S. Ct. 370, 373, 50 L. Ed. 652 (1906) ("The most valuable function of the grand jury [is] to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.").

Appendix F

The grand jury is vested with the authority to investigate. Subject to constitutional limitations, it possesses the power to subpoena and interrogate witnesses and to require the production of documents. Implicit in this power is the duty not to investigate, interrogate, subpoena when the grand jury finds there to be an insufficient basis on which to believe that a crime has been committed.

The authority here given to the Attorney General to conduct investigations under ***N.J.S.A.*** 2C:41-5 of persons reasonably suspected of having information pertinent to an investigation violates a citizen's inalienable right to the protection of the grand jury. That the evidence acquired by the Attorney General's Office would ultimately have to be presented to a grand jury for indictment does not change this fact.

There is a significant difference between a grand jury proceeding and an ***N.J.S.A.*** 2C:41-5 investigation. A grand jury stands between the prosecuting arm of the State and the citizen. The prosecutor must compile and present evidence to the grand jury for its consideration and the grand jury determines whether or not to subpoena witnesses. Here, the prosecutor, i.e. the State, seeks to subpoena the target of an investigation, commanding him to appear and give testimony to the State, and to turn over records in which he has a possessory and a participatory interest for the State to inspect to try to build a case against the Petitioners. Here, the State proceeds free of the intervening presence of the grand jury.

N.J.S.A. 2C:41-5 arms the State with a formidable weapon with which to manipulate and overpower the grand jury in carrying out its constitutionally designated role. As employed in the present investigation, it gives the State too much power

to circumvent the rights of the citizen to the grand jury because, as demonstrated here under the statute, the State is permitted the opportunity to exploit the citizen's respect for the State by serving Investigative Interrogatories with the imprimatur of the Attorney General commanding appearance at the Attorney General's Office with the information requested merely on the State's suspicion that the witness possesses some information that might be useful to an investigation that the Attorney General purports to be conducting. Many citizens will no doubt comply (as above recognized by the Court) without ever challenging the infringement of their rights. However, as in the instant matter, even where the validity of the investigation is challenged, the State can claim that its investigation is based upon information provided by an informant and that its investigation and the welfare of the informant will be jeopardized by disclosing the name thereof. Of course, were the prosecuting arm of the State required to conduct the investigation subject to the intervening presence of the grand jury, at least twenty-three individuals, unbiased and independent from the State, would first have to evaluate this information for its veracity and relevance. ***Cf. State v. Hilltop Private Nursing Home Inc.***, 177 N.J. Super. 377 (App. Div. 1981) (prosecutor does not have the power to subpoena an individual to appear before the prosecutor's office and cannot prevent the witness from presenting the subpoenaed materials directly to the grand jury instead of the prosecutor). Yet, the current investigation was permitted to proceed without any of the information possessed by the purported informant being disclosed to the Court or the Petitioners. If, of course, the State is wrong and no incriminating evidence can be obtained against the witness, well then the State can decide not to present the matter to the grand jury. This does little to protect the arbitrarily subjected witness from the infringement which he has been forced to endure because of the State's suspicions.

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POINT IV

THE TRIAL COURT'S DENIAL OF PETITIONERS' REQUEST THAT THE INVESTIGATIVE INTERROGATORIES BE STRICKEN DUE TO THE STATE'S IMPROPER USE OF THE AUTHORITY GRANTED UNDER *N.J.S.A.* 2C:41-5 DEPRIVED PETITIONERS OF THE PROTECTION OF THE COURT AS CONTEMPLATED WITHIN THE STATUTE AND CONSTITUTED AN ABUSE OF DISCRETION.

On May 15, 1996, Petitioners asked the Court to vacate its April 17, 1996 ruling because of newly discovered evidence (9T 6). The evidence was set forth in the State's papers submitted to the Appellate Division and Supreme Court in opposition to Petitioners' request for a stay of the Trial Court rulings pending appeal. The evidence grossly contradicted the position the State was taking as to its reason for propounding these interrogatories.

The State argued throughout the lower court proceedings that it was suffering irreparable injury by having Roe Corporation continuing to act in its capacity as general contractor for the New Jersey Sports and Exposition Authority Atlantic City Convention Center project, and that significant delays in that project which had resulted were typical of mob related activities to extort monies from the citizens of New Jersey (9T 14). However, the State's certifications to the Appellate Division and Supreme Court, while on one hand indicating delay as a "mob" tactic, in its own Affidavit of Thomas Grusmeyer indicate that John Doe had paid substantial sums of

money in order to avoid labor disputes and thereby gained an unfair advantage in being able to complete projects with greater ease. The Grusemeyer Certification demonstrates how the State contradicted its position to gain an advantage when it suited their needs without the proper due process requirements of a showing of proof to support their representations.

During the course of the Trial Court hearings regarding the relevance and propriety of the questions propounded by the State, the State represented the interrogatories were served for investigative gathering purposes based upon possible leads of illegal activity. To support their position before the Court, it argued it needed the requested information to determine whether there was substance to what seemed during the hearings to be nothing more than rumors and parlor talk from questionable figures who were shrouded in immunity and self-interest.

Petitioners' counsel argued that the State's certifications submitted to the Appellate Division and Supreme Court unequivocally demonstrated that John Doe was not only the target of this proceeding but had been a target of the State for a significant period of time predating these proceedings. Counsel argued that the State was attempting to force Doe and Roe to answer the interrogatories not for investigative purposes, but to harrass the Petitioners and to lie in wait for the Petitioners to erroneously answer the questions so that the State could bring a false swearing action against Petitioners (9T 16:5-13). Counsel further argued that the State's certifications demonstrated that the State had specific first hand investigative information from Government agents regarding the Petitioners from the State Police and the Federal Bureau of Investigation (9T 18). Amazingly most of this information existed and was known prior to awarding the contract for the Atlantic City Convention

Center and many of the questions the State purportedly sought to "learn" for investigatory purposes (as per the intendment of the statute), they already knew, not from infamous and questionable informants, but from Government investigators, surveillances, wiretaps, and audio/video intercepts.

Counsel argued that the State was seeking answers to questions it already knew the answers to, so that it could go before the grand jury and/or trial jury for the purpose of raising any inconsistencies in Petitioners' answers as substantive evidence of guilt, as opposed to misrecollection, failure to recollect, or, as all humans are subject to, mistake.

In the end, even if these "inconsistencies" are not used to indict John Doe for "mob" related activity, they could easily be used to destroy his reputation, harm him financially, as was done in this matter, causing Doe and Roe the loss of a multi-million dollar letter of credit and six million dollar lease (6T 13:6-15:22), support a charge of false swearing, subjecting Doe to yet further legal harassment, expense, and embarrassment. How is a Court expected to rule on the relevance of information sought by the State if the State is allowed to withhold the fact that it already has that information? The Court erroneously assumed throughout the proceedings that the State would act responsibly when given an extraordinary amount of power. Petitioners demonstrated that the State did not use the power it was given as intended in the Statute, and the Court's failure to do anything about this fact demonstrated that the judicial branch failed to provide the checks and balances necessary to protect a citizen from an overreaching government. The Petitioners specifically cited to the Court the information contained in the State's certifications, which demonstrated the State's abuse of the statute. For example, the Grusemeyer Affidavit indicated

that John Doe was intercepted at the Palma Boy's Club speaking to Anthony Salerno (9T 11). The affidavit also indicated that John Doe met with an individual known as Liborio "Barney" Bellomo (9T 11:24-25). The examples went on, but all indicated that many of the questions asked of Petitioners, the State clearly had the answers to already (9T 9-18:14).

The inherent power granted by the statute simply reposes too much unbridled power in the hands of the Attorney General. That the Court should ask questions in order to determine the relevancy of the State's interrogatories, and that the State should fail to advise the Court that it already had the information sought, places the judicial branch in a position where it could no longer meaningly fulfill its judicial obligation under the statute as drafted. The statute eliminates the constitutional balance of power that citizens are entitled to. Simply put, it vests unchecked power in the State in violation of the Separation of Powers doctrine inherent in the United States Constitution.

The evils of the manner in which the State is using this statute is mounting. The State or its agents have leaked information to the protected press. The Court erred in permitting the State to still require answers to interrogatories despite the Court's knowlege that the State did not give all the information the Court required to make a meaningful decision as to the applicability of the Statute, and they should be allowed to continue under the power granted in that statute to the detriment of petitioners. This could not possibly be the intendment of the statute and it is clearly the kind of abuse the legislature was concerned about during its passage. The State had the information they asked John Doe to provide. They should have used the grand jury process and indicted if they so choose and not hide behind the statute and use it to hopefully "lay in wait"

in order to gather contradictory information from the target himself and for no other legitimate purpose.

They were not using the statute properly, and on that basis, the Court should have vacated its prior order compelling Roe and Doe to answer the interrogatories.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request the Court to reverse the Trial Court Orders dated February 13, 1996 and April 17, 1996, to adjudge ***N.J.S.A.*** 2C:41-5 unconstitutional in violation of the Petitioners' Fourth and Fifth Amendment rights as guaranteed by the United States Constitution and Article 1, Paragraph 7 of the New Jersey Constitution, and to adjudge the Investigative Interrogatories propounded pursuant to ***N.J.S.A.*** 2C:41-5 outside the scope of the statute's original intendment and the Court abusing its discretion in not granting Petitioners' motion to vacate its previous orders.

Respectfully submitted,

BIANCHI & BIANCHI

Attorneys for Petitioners/Appellants
John Doe and Roe Corporation

By:
ANGELO R. BIANCHI

DATED: September 9, 1996

APPENDIX G — EXCERPTED PETITIONERS' REPLY APPELLATE BRIEF DATED NOVEMBER 25, 1996

IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
***Docket No.* A-4643-95TI**

Civil Action

In The Matter

of

JOHN DOE and

ROE CORPORATION,

Petitioners/Appellants.

On Appeal From:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ATLANTIC COUNTY
Docket No. ATL-L-3693-95

Sat Below:

Honorable Richard J. Williams, A.J.S.C.

* * *

Appendix G

REPLY BRIEF AND APPENDIX ON BEHALF OF PETITIONERS /APPELLANTS JOHN DOE AND ROE CORPORATION

from William R. Gicking, D.A.G. to Richard J. Williams, A.J.S.C., wherein the State requested permission to submit an affidavit stating the reasons for the investigation and establishing "the nexus between the investigation and the specific questions and demands made" out of the presence of Appellants or Appellants's counsel (Pa 92-93). The Court, erroneously, never required the State to establish the existence of an investigation and the nature and subject matter thereof, but instead scheduled hearings to address the reasonableness of the demands after issuing its January 31, 1996 Opinion adjudging the investigation constitutionally and statutorily proper. The record contains no evidence of the Court ever requiring the State to establish the existence of an investigation and the nature and subject matter thereof. (*See* 1T-3T, *passim*).

Presumably, the Court was persuaded by Detective Grusemeyer's affidavit indicating that the State could not come forward with this information because the State's investigation and the welfare of the State's informants would be jeopardized (Pa 89-91). Indeed, at the February 23 and 26, 1996 hearings, held to determine the reasonableness of the interrogatories, the State was never required to establish the existence of an investigation and the nature and subject matter thereof, other than by the obvious fact that the State was investigating the Appellants and was in Court responding to Appellants's objections to the reasonableness and relevancy of said interrogatories. (*See* 2T, 3T). Clearly, the statutory requirements here were not met.

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N.J.S.A. 2C:41-5b(1) requires that when an interrogatory is propounded "the nature of the conduct constituting the alleged violation which is under investigation" be set forth on the interrogatory. In addition, *N.J.S.A.* 2C:41-5j requires that when a petition to modify or set aside the interrogatory is filed that the State "establish the existence of an investigation pursuant to this chapter and the nature and subject matter of the investigation." Clearly, subsection j imposes an obligation upon the State, in addition to that set forth in subsection b(1), to come forward with proof that a valid investigation is being conducted and to establish the nature and subject matter of the investigation. The requirement of subsection j is more specific than the subsection b(1) requirement.

In view of the grave concerns expressed by the legislature prior to enacting *N.J.S.A.* 2C:41-5, it is clear that the State was correct when it stated that the Court had to consider its affidavit which would establish the reasons for the investigation and establish the nexus between the investigation and the specific questions and demands made (Pa 92-93). That an investigation was being conducted to determine whether John Doe and Roe Corporation were controlled and financed by organized crime was obvious from the face of the interrogatory and was communicated to Appellants under the requirements of *N.J.S.A.* 2C:41-5b(1). Because the legislature specifically exempted *N.J.S.A.* 2C:41-5 from *N.J.S.A.* 2C:41-6, the liberal construction provision for the statute, the Court should have strictly required the satisfaction of the protections afforded Appellants within *N.J.S.A.* 2C:41-5. The Court's failure to make the State satisfy the requirements of *N.J.S.A.* 2C:41-5j deprived Appellants of their right to assure that they were not being arbitrarily subjected to the expense, harassment and anxiety of the investigation without good cause.

Appendix G

Moreover, when read together, *N.J.S.A.* 2C:41-5b(1) and *N.J.S.A.* 2C:41-5j are consistent with the legislative history. The legislature spent a great deal of time in drafting and enacting this statute. The seeming duplicitousness of subsection b(1) and the last sentence of subsection j underscores the fact that the original intendment of *N.J.S.A.* 2C:41-5 was that it would only be applied to non-targets. For example, if, as here, "the nature of the conduct constituting the alleged violation under investigation" (*N.J.S.A.* 2C:41-5b[1]) is the control and financing of the witness by organized crime, then the requirement of subsection j that the nature and subject matter of the investigation be established when a petition to modify or set aside is filed appears wholly redundant. If, however, using the example given in the legislative history, the interrogatories were propounded upon a non-target witness, such as a customer who was paying inordinately high rates for garbage removal, then the two seemingly redundant provisions become not redundant at all.

If, as was contemplated in the October 30, 1980 Assembly Committee Hearing on A1079 (*see* Sa 99) an investigative interrogatory would be propounded only upon a non-target, such as a customer of garbage removal services, then the customer would be told, pursuant to *N.J.S.A.* 2C:41-5b(1), that the nature of the conduct under investigation was anti-competitive practices in the garbage removal business. If the customer were then to file a petition to modify or set aside the interrogatory, under *N.J.S.A.* 2C:41-5, the State would then have to come forward with additional information and establish the existence, nature and subject matter of the investigation. This would require the State to give the witness additional information, such as that the garbage removal company which removes Appellants' garbage is under investigation for price

fixing and other anti-competitive practices. Significantly, moreover, in that instance the State would be

* * *

APPENDIX H — EXCERPTED PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION TO NEW JERSEY SUPREME COURT DATED JULY 21, 1997

SUPREME COURT OF NEW JERSEY
No. 44,535

APPELLATE DIVISION
Docket No. A-4643-95T1

In the Matter of

JOHN DOE

and

ROE CORPORATION,

Petitioners.

BRIEF IN SUPPORT OF
PETITION FOR CERTIFICATION

* * *

STATEMENT OF THE MATTER INVOLVED

This matter involves an investigation, conducted by the Office of the Attorney General ("Attorney General" or "State"), under the auspices of the Racketeering Section of the Criminal Justice Act of 1970 ("RICO Act"), *N.J.S.A.* 2C:41-1 *et seq.* More specifically, it involves the State's use of *N.J.S.A.* 2C:41-5, which delegates to the State the power to propound investigative interrogatories ("Interrogatories or Interrogatory") upon any person or enterprise whom the State reasonably

suspects has information relevant to an investigation conducted under the RICO Act.

On July 26, 1995, the Attorney General served upon John Doe and Roe Corporation ("Doe and Roe" or "Petitioners") two identical sets of Interrogatories pursuant to *N.J.S.A.* 2C:41-5. The Interrogatories consisted of 291 questions, exclusive of subparts, and a document demand directed at Roe. The questions and document demand were preceded by a cover sheet containing the official seal of the State and signed by a deputy attorney general. The cover sheet "directed" the Petitioners to appear before the undersigned deputy attorney general on September 11, 1995 and to produce the documents demanded and furnish responses to the questions asked. The Petitioners were further advised that the information requested was "deemed necessary in connection with the enforcement of the New Jersey Racketeering Law *N.J.S.A.* 2C:41-1 *et seq.*, said conduct allegedly consisting of the control and financing of [Roe Corporation] and its owner, [John Doe] by Organized Crime." (Pa70). This information was provided pursuant to *N.J.S.A.* 2C:41-5b(1). *N.J.S.A.* 2C:41-5b(1) requires the Attorney General to "[s]tate the nature of the conduct constituting the alleged violation which is under investigation and the provision of law which is applicable thereto . . . " whenever Interrogatories are propounded under the statute.

The Petitioners challenged the manner in which the State was using the Interrogatories by filing a petition to modify or set aside the Interrogatories pursuant to *N.J.S.A.* 2C:41-5j. *N.J.S.A.* 2C:41-5j provides in pertinent part:

> At any time before the return date specified in the interrogatory, [a] person may file in the Superior

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> Court a petition for an order modifying or setting aside the interrogatory. . . . The petition shall specify each ground upon which the petitioner relies in seeking relief, and may be based upon any failure of the interrogatory to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the petitioner. **In such proceeding the Attorney General shall establish the existence of an investigation pursuant to this chapter and the nature and subject matter of the investigation.** (Emphasis added).

The Petitioners asserted that the Attorney General was using the statute in violation of its original intendment insofar as the legislature intended *N.J.S.A.* 2C:41-5 to be used to gather information from third parties, not from the target of an investigation. The Petitioners further asserted that *N.J.S.A.* 2C:41-5 was unconstitutional, i.e., it impermissibly delegated the investigatory powers of the grand jury to the Attorney General. In addition, Petitioners argued that the investigation violated their rights under the Fourth and Fifth Amendments of the United States Constitution and Article 1 paragraphs 7 & 8 of the New Jersey Constitution. On October 27, 1995, the Court heard argument from counsel. During argument, Petitioners' counsel also raised the State's obligation to establish the existence, nature and subject matter of the investigation under *N.J.S.A.* 2C:41-5j. (1T18; Pa82-88; Pb5)(Pa = Petitioners' Appendix; Pb = Petitioners' Appellate Brief; Sa = State's Appendix).

Shortly after this hearing and before the Court issued its opinion regarding the constitutionality of the statute, the Attorney General advised the Court that she believed it was

necessary for the Court to be apprised of the basis for the investigation prior to ruling on the arguments made by the Petitioners. The State believed that the Court had to be made aware of the underlying facts on which the Interrogatories were based in order to rule upon the propriety of the Interrogatories and requested the Court's permission to file an *ex parte* affidavit for an *in camera* review by the Court (Pa92) on the basis that the decision to propound the Interrogatories was premised upon information provided by a confidential informant. (Pa89). The Petitioners agreed that this information had to be provided to the Court but objected to its presentation via *ex parte* affidavit.

Notwithstanding the State's recognition of its statutory obligation to establish the nature and subject matter of the investigation, the Court did not consider the State's affidavit and did not require compliance with the strict dictates of *N.J.S.A.* 2C:41-5j. Instead, on January 31, 1996, the Trial Court issued an Opinion adjudging the State's use of *N.J.S.A.* 2C:41-5 to be within the original intendment of the statute and finding the statute not violative of the Petitioner's constitutional rights. (Pa24).

The Trial Court then scheduled hearings to consider the Petitioners' assertion that the Interrogatories were unduly broad and burdensome, i.e., that they were not relevant to the stated purpose of the investigation, limited in scope, and specific in directive. At these hearings, the Court still did not require the State to establish the existence, nature and substance of the investigation but, apparently, considered the relevance, scope, and specificity of each Interrogatory against the stated nature of conduct under investigation, i.e., the control and financing of Doe and Roe by organized crime, which was specified on the Interrogatory cover sheet pursuant to the explanatory provision of *N.J.S.A.* 2C:41-5b(1). Throughout these proceedings, the

reason given by the State to justify the Interrogatories was that the State was in possession of information to indicate that Roe is a "mob company", whatever that means and whatever law that violates is unknown (2T44,49). This was the only explanation ever given by the State to purportedly establish the existence, nature, and subject matter of the investigation as required by *N.J.S.A.* 2C:41-5.

Apparently accepting the State's explanation at face value, the Court evaluated the relevance, scope, and specificity of each Interrogatory and primarily accepted as sufficient the State's assertion that (1) the questions asked and documents demanded were necessary to determine if the State's information was accurate, and (2) that there really was no way to justify the relevance of any particular request until after the information was received. (1T62:22-24; 2T44:13-24; 2T140:12-25). On March 26, 1996, the Court ordered the Petitioners to answer the Interrogatories, as partially modified by the Court, and to make all of Roe's corporate and financial records (from 1978 to the present) available for inspection. (Pa14; Sa1).

During the Trial Court proceedings there were various media leaks regarding the Petitioners' identity and the fact that Interrogatories were served upon them. These leaks were in violation of *N.J.S.A.* 2C:41-5f and the Trial Court's sealing order. The Petitioners asked the Court to strike the Interrogatories in view of the near certainty that the leaks originated from the State and the Attorney General's failure to afford Petitioners the confidentiality mandated by the statute. In fact, the Court indicated during oral argument that it was probably no small coincidence that a reporter who showed up at the Courthouse, nearly simultaneously with the State's filing of a premature petition to compel answers to the Interrogatories, had previously

worked for the Attorney General as a public information officer (2T14-15). The Court refused to afford the Petitioners any relief, but notified the State of the apparent violation of *N.J.S.A.* 2C:41-5f. The Attorney General decided not to investigate the matter.

On appeal, the Petitioner's challenged the Trial Court rulings, asserting the same arguments that were raised before the Trial Court. Among other things, the Petitioners argued that the Trial Court's failure to strictly require the State to establish the existence, nature and subject matter of the investigation, pursuant to *N.J.S.A.* 2C:41-5j deprived Petitioners of their statutory and constitutional rights. The Petitioners asserted also that the Trial Court failed to exercise its discretion to strike the Interrogatories in view of the uncontrolled media leaks, the demonstrated harm caused to the Petitioners as a result thereof, and the wholly illusory nature of the protection purportedly afforded the Petitioners by *N.J.S.A.* 2C:41-5f. (Pb69-10, 13; Pa617). It was further argued, among other things, that the Court should have stricken the Interrogatories because of the demonstrated abusive purpose on which they were based.

The Appellate Division affirmed the Trial Court's holdings, among other reasons, on the basis that the statutory predicate requiring the State to establish the existence, nature and subject matter of the investigation was obviated by the Petitioners' contention that they were the targets of "a" criminal investigation. The Appellate Division failed to rule upon the Petitioners' fourth argument of their brief, that the State abused the process of *N.J.S.A.* 2C:41-5 by purportedly seeking information with the Interrogatories that the State already possessed. For the following reasons and the reasons set forth in the Petitioners' Appellate briefs submitted herewith, Doe and Roe now petition this Court to hear their appeal.

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QUESTIONS PRESENTED

1. Whether a petitioner's contention in a proceeding conducted pursuant to *N.J.S.A.* 2C:41-5j that he is the target of Interrogatories propounded under the authority delegated to the Attorney General pursuant to *N.J.S.A.* 2C:41-5 obviates the need for the Court to verify the existence, nature, and subject matter of the investigation as required by *N.J.S.A.* 2C:41-5j.

2. Whether Courts should strictly construe *N.J.S.A.* 2C:41-5 in view of the fact that the legislature specifically excluded this provision from the New Jersey Rico Act's liberal construction provision set forth in *N.J.S.A.* 2C:41-6 and the fact that *N.J.S.A.* 2C:41-5 enables the Attorney General to exercise the subpoena powers constitutionally reserved for the grand jury.

3. Whether the original intendment of *N.J.S.A.* 2C:41-5 was that it would be used only against non-target third parties as an efficient method for gathering information to be used against the target of a criminal investigation.

4. Whether propounding Interrogatories under *N.J.S.A.* 2C:41-5 to obtain information already within the possession of the Attorney General is an improper use of the statute.

5. Whether in view of the State's having leaked to the press the substance and nature of the Interrogatories and the Petitioners' identities in violation of *N.J.S.A.* 2C:41-5f, the Court should have stricken the Interrogatories.

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ERRORS COMPLAINED OF
POINT ONE

THE APPELLATE DIVISION IMPROPERLY DETERMINED THAT THE PETITIONERS' CONTENTION THAT THEY WERE TARGETS OF THE INVESTIGATIVE INTERROGATORIES OBVIATED THE NEED FOR THE ATTORNEY GENERAL TO ESTABLISH THE EXISTENCE, NATURE, AND SUBJECT MATTER OF THE INVESTIGATION.

In its opinion, the Trial Court concluded that New Jersey's RICO Act requires courts to use the same standard of review in passing upon the validity of Interrogatories as is used when evaluating what information may be demanded pursuant to a grand jury subpoena. The Court further concluded that the analysis for reviewing grand jury subpoenas is the same as that which a court must conduct when reviewing administrative subpoenas. (Pa32).

As stated by the Trial Court, although an agency need not show probable cause to issue an administrative subpoena, an agency must demonstrate that the purpose of its inquiry is legitimate under the statute, "that the inquiry is relevant to that purpose, and that the required administrative steps have been duly followed." (Pa 32). The case of *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964), which the Court cited for the above standard, held that when an administrative subpoena is challenged the investigating agency must show: "[1] *that the investigation will be conducted pursuant to a legitimate purpose*, [2] that the inquiry may be relevant to that purpose, [3] *that the information sought is not already within the [investigating agency's] possession*, and [4]

that the administrative steps required by the [enabling legislation] have been followed. . ." *Id.* at 57-58, 85 S. Ct. at 255, 13 L. Ed. 2d 112. (Emphasis added).

In the case at bar, the legislature attempted to assure the satisfaction of the *Powell* requirements by imposing a disclosure requirement upon the State in *N.J.S.A.* 2C:41-5j. This requirement clearly requires more than merely stating "the nature of the conduct which is under investigation" *N.J.S.A.* 2C:41-5b(1). Notwithstanding the State's recognition of its obligation to come forward with the information required by *N.J.S.A.* 2C:41-5j, the Court never made the State produce this information and thus failed to afford the Petitioners the statutory and constitutional protections to which they were entitled.

The Appellate Division decision, affirming the Trial Court's failure to enforce the disclosure requirement, is based upon an inaccurate reading of the record. Moreover, the holding's rationale is erroneous. It absolves the State and lower Courts of their statutory and constitutional responsibility to strictly comply with the express dictates of the statute whenever the recipient of Interrogatories asserts that the Interrogatories are being used improperly to target him for indictment.

That the Petitioners were being investigated was obvious by virtue of their having been directed to respond to the Interrogatories and to respond to the production of a document demand requiring Roe to produce each and every document maintained by the corporation from the date of its incorporation in 1978 until the present day[1]. Given the nature of the questions

1. Significantly, at the Assembly Committee hearing held in 1980 to discuss the drafting and enactment of *N.J.S.A.* 2C:41-5, the Attorney General's Office and Counsel to the Governor assured the (Cont'd)

asked, the unrestricted sweep of the document demand (Sa1), and the tone and substance of a meeting that was held between the Attorney General's Deputy Director, Michael Bozza, and the Petitioners the day before the State filed its premature motion to compel answers (6T7) the Petitioners argued that the statute was being used improperly as they were being targeted with the Interrogatories in contravention of the statute's original intendment.

The only way for the Trial Court to have satisfied itself would have been for the Court to have required the State to establish the existence, nature, and subject matter of the investigation. The State's request to submit an affidavit to the Court for *in camera* review may have been a way for the Court to have satisfied *N.J.S.A.* 2C:41-5j's statutory predicate in accordance with the *Powell* standard. It may have been sufficient

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(Cont'd)

Committee repeatedly that if given the power to propound Interrogatories, the Attorney General's Office would, for the most part, just use them to tap non-target third party witnesses on the shoulder to obtain information in connection with the investigation of a target so that the State could more efficiently gather evidence in pursuit of an investigation with the least inconvenience to the non-target witness as possible. That, as here, they would be used to seat an 800 pound gorilla in the lap of a targeted witness clearly was not the intent or purpose for the statute (*See* Pa94). For the reasons set forth herein, the State's current use constitutes a misuse of the statute in contravention of the legislative intent and the Petitioners' statutory and constitutional rights. To let the Appellate Division decision stand will countenance future violations of the statute and sanction the infringement of citizens' liberty interests as an emboldened Attorney General's Office expands its use of the statute beyond its enacted parameters and witnesses fail to question these practices in view of the unrestrained lower Court rulings.

for the Court[2] to determine whether there was a good faith basis for the investigation. At this point, however, one can only speculate.

The Trial and Appellate Courts clearly shirked their obligation to assure the strict interpretation of *N.J.S.A.* 2C:41-5 which the legislature intended. *See N.J.S.A.* 2C:41-6 (exempting *N.J.S.A.* 2C:41-5 from the New Jersey RICO Act's liberal construction provision). The conclusory manner in which the Appellate Division addressed this issue in its opinion evidences a cavalier attitude to assuring the protections of the statute and demonstrates clearly why the legislature exempted *N.J.S.A.* 2C:41-5 from the RICO Act's liberal construction provision. In effect, and notwithstanding the dictates of the *Powell* standard, the Trial and Appellate Courts here construed the *N.J.S.A.* 2C:41-5j disclosure requirement as if it were irrelevant surplusage, a mere redundancy of the explanatory predicate set forth in *N.J.S.A.* 2C:41-5b(1).

The Appellate Division affirmed the Trial Court on the basis that the Petitioners' contended that they were targets of "a" criminal investigation and, in so doing, obviated the need for the Trial Court to consider the Attorney General's affidavit or otherwise insist upon compliance with *N.J.S.A.* 2C:41-5j. The

2. It is also quite possible that an insufficient basis or bad faith may have been uncovered. When the Interrogatories were propounded upon Doe and Roe, Roe was under contract with the New Jersey Sports and Exposition Authority ("NJSEA") for the construction of the Atlantic City Convention Center. At or about this time, Roe and the NJSEA were embroiled in a dispute over interpretations of the contract and over certain work scheduling issues (2T12). One can only wonder if the State's confidential informants were affiliated with the NJSEA and/or if the State could have had any motive for conspiring with the NJSEA to put pressure on the Petitioners.

Appellate Division stated that the Petitioner's contention that they were targets of "a" criminal investigation represented "an apparent change of position".

The Petitioners never maintained that they were the targets of "a" criminal investigation. Petitioners consistently asserted that they were targets of "the" *N.J.S.A.* 2C:41-5 investigation. (1T5,48). However, the Petitioners were never apprised of the existence of "a" criminal investigation or the basis for "the" *N.J.S.A.* 2C:41-5 investigation. Nothing in the record, absolutely nothing, supports or justifies the Appellate Court's mischaracterization of the Trial Court proceedings.

The standard fashioned by the Appellate Court that once a witness contends that he is the target of the Interrogatories the State no longer has to satisfy the statutory and *Powell* requirements cannot stand. Significantly, *N.J.S.A.* 2C:41-5j does not merely allow the witness to ask the State to disclose the existence, nature, and subject matter of a RICO investigation. It does not leave it to the Court's discretion. The statute mandates disclosure once a petition to modify or set aside is filed. Moreover, disclosure is not made contingent upon a witness's target status. Similarly, the *Powell* disclosure requirements are not contingent upon a witness's target status. Yet, the Appellate Division here, in effect, reads the disclosure provision of *N.J.S.A.* 2C:41-5j as if it were somehow dependent on whether the witness has been notified or believes himself to be a target. This interpretation is clearly wrong.

Whether a witness is notified of his target status is wholly unrelated to the Court's obligation to verify the legitimacy of the investigation once challenged. The only way for the Court to do this is by requiring the Attorney General to disclose the

factual basis and scope of the investigation. *See id.; see also United States v. Cortese,* 614 F.2d 914 (3rd Cir. 1980) (IRS Commissioner permitted to establish *Powell* criteria via *in camera* affidavit).

The Court's failure to view this information fatally taints these proceedings.

POINT TWO

THE APPELLATE DIVISION IMPROPERLY AFFIRMED THE TRIAL COURT'S DECISION FINDING THAT INVESTIGATIVE INTERROGATORIES MAY BE PROPOUNDED UPON TARGETS.

A review of the legislative history provided to the Trial and Appellate Courts establishes convincingly that the original intendment of *N.J.S.A.* 2C:41-5 was that it would not be used against targets of investigations[3]. The legislature was misled into enacting the statute as drafted by the repeated assurances of the Attorney General's Office and the Counsel for the Governor that

* * *

Supreme Court, Certification should be granted. The issues presented in this appeal arise out of ambiguous and unclear provisions of *N.J.S.A.* 2C:41-5. Because of the dearth of case

3. The Petitioners' appendix included excerpted portions of the transcript of the October 30, 1980 Assembly Judiciary, Law, Public Safety and Defense Committee meeting which addressed in great detail the intended purpose and scope of *N.J.S.A.* 2C:41-5. The Respondent's appendix included the entire transcript.

law in this State interpreting the statute, the Trial Court had to improvise its holding from (1) the law in this State on grand jury investigations, and (2) the United States Supreme Court decisions with respect to administrative subpoenas. As set forth above, the Petitioners submit that the Trial Court failed to exercise the powers available to it in considering their challenge to the Interrogatories. The Trial Court failed, moreover, to enforce the statutory disclosure requirements which were clearly derived from ***Powell***. It is submitted that the Trial Court failed to adequately protect the Petitioners' rights in this proceeding because of the statutory ambiguities and the absence of any clear directive from this Court on the manner in which this statute should be interpreted and applied. It is further respectfully submitted that the ambiguities of ***N.J.S.A.*** 2C:41-5, as made manifest in this proceeding, cry out for clarification by this Court.

For the foregoing reasons, the petitioners, John Doe and Roe Corporation, respectfully request that their Petition for Certification be granted.-

Respectfully submitted,

BIANCHI & BIANCHI
Attorneys for Petitioners

By:
MARK A. WENCZEL

APPENDIX I — NEW JERSEY SUPREME COURT DENIAL ON PETITION FOR CERTIFICATION DATED SEPTEMBER 16, 1997

SUPREME COURT OF NEW JERSEY
C-134 September Term 1997
44,535

IN THE MATTER OF JOHN DOE
and ROE CORPORATION

(JOHN DOE and ROE CORPORATION — Petitioners)

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4643-95 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Alan B. Handler, Presiding Justice, at Trenton, this 16th day of September, 1997.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT OF NEW JERSEY

APPENDIX J — AFFIDAVIT DATED JANUARY 3, 1996 AND LETTER DATED NOVEMBER 16, 1995 IN SUPPORT OF THE STATE'S APPLICATION TO SUBMIT AN *IN CAMERA* AFFIDAVIT ESTABLISHING THE REASONS FOR THE INVESTIGATION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — ATLANTIC COUNTY

IN THE MATTER OF THE INVESTIGATIVE INTERROGATORIES PROPOUNDED UPON *** AND ***

CIVIL ACTION

AFFIDAVIT IN SUPPORT OF THE STATE'S APPLICATION TO SUBMIT, *IN CAMERA*, WITH ACCESS DENIED TO *** AND COUNSEL ANGELO BIANCHI, ESQ. AN AFFIDAVIT ESTABLISHING THE REASONS FOR THIS INVESTIGATION AS WELL AS THE REASON FOR THE SPECIFIC QUESTIONS WHICH MAKE UP THESE INVESTIGATIVE INTERROGATORIES

STATE OF NEW JERSEY ss:

COUNTY OF MERCER

DETECTIVE SERGEANT FIRST CLASS DAVID GRUSEMEYER, Badge #2952, of full age, having been duly sworn by oath, according to law, depose and say:

1. I am a Detective Sergeant with the New Jersey State Police currently assigned as the Assistant Supervisor of the Casino Intelligence Unit. In such capacity, I am currently responsible for the investigation involving the serving of

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Investigative Interrogatories upon * * * As such, I am fully familiar with the facts surrounding this investigation.

2. I have been a member of the New Jersey State Police for the last twenty-one years. Pursuant to my official duties, I have conducted hundreds of investigations into organized crime. These investigations have included the offenses of gambling, extortion, murder, racketeering, as well as identifying and investigating organized crime infiltration into the construction industry. I have prepared affidavits for search warrants and interviewed informants and defendants who were familiar with the above-noted crimes. I have attended various New Jersey State Police Schools, including the Criminal Investigations School, various narcotic investigations schools, the Organized Crime School, and the Casino Investigations School.

3. From my education, training, and experience, I am familiar with the manner in which members of organized crime attempt to infiltrate and/or control the construction industry. I am also familiar with the manner in which members of organized crime deal with individuals who provide information to law enforcement regarding organized crime activities. It is well-documented and undisputed that those individuals that are discovered by members of organized crime to be cooperating with law enforcement are dealt with harshly by organized crime. Such individuals have frequently been murdered both in reprisal for their cooperation and to assure that they are unable to further cooperate with law enforcement. Consequently, it is clear that if any confidential sources involved in this investigation are identified by organized crime, their lives will be in danger.

4. In addition, I know from my training and experience that revealing the specific facts and details known to law

enforcement agencies regarding this investigation will severely compromise its viability and integrity.

5. In conclusion, the disclosure of the information upon which this investigation is based would compromise this investigation and other investigations into organized crime, as well as endanger the personal safety of confidential sources that are presently active in both this investigation and other investigations into organized crime. Consequently, it is essential that this information remain confidential at this point in time. In fact, I am unable to supply more specific information in this Affidavit due to my concerns regarding jeopardizing this investigation, other investigations, and the potential safety of sources.

s/ David Grusemeyer
DAVID GRUSEMEYER

Sworn to and subscribed before me
this 3rd day of January 1996.

s/ William R. Gicking
Attorney-at-Law
State of New Jersey

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STATE OF NEW JERSEY
DEPARTMENT OF LAW OF PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
25 MARKET STREET
CN 085
TRENTON, NJ 08625-0085
TELEPHONE: (609)984-6500

DEBORAH T. PORITZ
ATTORNEY GENERAL

TERENCE P. FARLEY
DIRECTOR

November 16, 1995

Honorable Richard J. Williams, A.J.S.C.
Court House
1201 Bacharach Boulevard
Atlantic City, New Jersey 08401

PERSONAL AND CONFIDENTIAL

Re: In the Matter of Investigative Interrogatories
Propounded Upon . . . and . . .

Dear Judge Williams:

Your Honor had requested that both the State and Mr. Bianchi submit prospective dates for scheduling the continuation of oral argument regarding the above captioned matter. The State is available for continuation of oral argument on any date after November 27, 1995. We request that the matter be scheduled as soon as possible. However, it is the State's position that certain preliminary issues should be resolved prior to the continuation of oral argument.

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At the conclusion of the prior oral argument, Mr. Bianchi indicated that he intended to submit additional papers to the Court. To date, the State has not received any additional submissions from Mr. Bianchi. With respect to the remaining issue to be argued, whether the interrogatories are unduly burdensome, Mr. Bianchi has provided no specifics regarding which questions or document demands he submits are unduly burdensome. It is respectfully submitted that Mr. Bianchi should specify any particular questions which he objects to beyond the general blanket assertion that the entire set of interrogatories is unduly burdensome. The State can than be in a position to set forth the information available to the State which justifies the particular questions to which Mr. Bianchi objects.

It is respectfully submitted that Your Honor must be made aware of the underlying facts which form the basis for the Investigative Interrogatories in order to determine whether the interrogatories are proper.

Therefore, the State requests permission to submit an affidavit, *in camera*, which states the reasons for the investigation and established the nexus between the investigation and the specific questions and demands made by these investigative interrogatories. At this point, the State must not be required to disclose this information to Mr. Bianchi or his client. Therefore, the State requests permission to file the Affidavit under seal, to be reviewed by the Court *in camera*. The submission of such an Affidavit under seal was the precise course of action which was taken by the Court in *Benson v. People*, 703 *P.*2nd 1274, 1279 (Colo. 1985). That case is the only published opinion which the State has found that addresses the issue of evaluating the propriety of investigative interrogatories served under the RICO statute.

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Respectfully submitted,
s/ William R. Gicking
William R. Gicking
Deputy Attorney General

c: Angelo Bianchi, Esq.

APPENDIX K — LETTER FROM PETITIONERS TO TRIAL COURT DATED JANUARY 10, 1996

LAW OFFICES
ANGELO R. BIANCHI
575 KINGSLAND STREET
NUTLEY, NEW JERSEY 07110
(201) 667-8500
FAX (201) 667-9573

****PERSONAL AND CONFIDENTIAL****
UNDER SEAL

January 10, 1996

Honorable Richard J. Williams
Atlantic County Superior Court
Court House
1201 Bacharach Boulevard
Atlantic City, New Jersey 08401

Re: In the Matter of Investigative Interrogatories
Propounded upon * * *

Dear Judge Williams:

Please accept this letter in lieu of formal brief submitted in support of * * * position regarding the investigative interrogatories propounded pursuant to *N.J.S.A.* 2C:41-5. * * * rely upon their brief dated November 21, 1995 responding to the State's premature request for additional oral argument. As addressed by you Honor at oral argument, it is premature at this time to conduct further argument in this matter prior to you Honor's ruling upon the constitutionality of *N.J.S.A.* 2C:41-5, both on its face, and as applied in the present matter. However,

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* * * submit this letter brief to clarify the confusion created by the recent submission of the State dated January 2, 1996, reiterating the same arguments raised in its previous untimely submission.

Viewing the State's submissions *in toto* demonstrates clearly the State's effort to exploit the ambiguity inherent in *N.J.S.A.* 2C:41-5. To justify violating * * * privacy with the investigative interrogatories, the State uses a two-handed argument. On one hand, the State argues that it has no evidence against * * * and that it therefore should be permitted to require * * * to respond to the investigative interrogatories and to cause his company, * * * to respond to the document demand as the State is not targeting * * * he is just a suspected source of information useful for an investigation being conducted under *N.J.S.A.* 2C:41-1 *et seq.* But, on the other hand, when asked to justify its reason for believing that * * * may have any information pertinent to the investigation, the State argues in effect that * * * is a target — i.e., that he and * * * are believed to be involved with organized crime. Thus, the State argues that it couldn't possibly be expected to give . . . any evidence in support of its purported suspicion because its investigation would be jeopardized.

The State cannot be permitted to have it both ways. Either * * * is a target, in which case the present use of the investigative interrogatories is wholly improper, or he is not. If he is truly not a target, then the State's investigation would not be jeopardized by having to produce ample evidence to justify its belief that * * * would actually have information relevant to its investigation.

Notwithstanding the prematurity of the State's present application, * * * and * * * submit that if your Honor rules the

statute constitutional and commences consideration of the statute as here applied, at the very least, the State must be required to support its so-called belief that * * * would have information relevant to its investigation. That any showing must be *in camera,* i.e. closed to the public, is undisputed.

As noted by the State, the only reported case on point, *Benson v. People*, 703 P.2d 1274 (Colo. 1985), required the production of a sealed affidavit. However, contrary to the State's allusion, *Benson* did not hold that the production should be out of the presence of the witness. *See id.* at 1279. Similarly, there is equally no justification for precluding the witness from seeing the State's proofs in the instant case. Indeed, production of such information in * * * presence is necessary to permit him to challenge the State's reckless assertions and to protect his good name and privacy interests.

In *John Doe v. Poritz*, 142 N.J. 1 (1995), the New Jersey Supreme Court recently reiterated that one's reputation and privacy are substantial protectible interests. *Id.* at 89. Thus, even if, for the sake of argument, the State could demonstrate that it has a good faith basis for believing * * * has information pertinent to the State's *N.J.S.A.* 2C:41-5 investigation, it must minimize the invasion of his right to privacy by utilizing the narrowest means which can be designed to achieve the public purpose." *Id.* at 90 (internal quotation and citations omitted). As noted in *Poritz*, the right to privacy is protected by the due process clause of the United States Constitution, U.S. Const. amend. XIV, and Article 1, paragraph 1 of the New Jersey Constitution. *Id.* at 99-100. Under the United States Constitution an individual is entitled to procedural due process when (1) his reputation and (2) his right to privacy are at stake because of what the government seeks to do. *Id.* at 101. Under the New

Jersey Constitution, due process of law must be afforded where what the government seeks to do jeopardizes *either* an individual's reputation or privacy interests.

Here, the State's actions violate both interests. First, its baseless allegations concerning organized crime profoundly affect * * * interest in his good name. Second, the sweeping investigation it seeks to conduct pursuant to *N.J.S.A.* 2C:41-5 clearly violates * * * right to privacy. *Id.* at 104. In the case at bar, moreover, the Fundamental Fairness doctrine requires that * * * be afforded the greatest procedural protections which the Court can fashion. Fundamental Fairness requires courts to use certain procedures not constitutionally compelled where necessary to protect an individual from being unfairly and arbitrarily signaled out by State. *See Id.* at 108-109. The doctrine "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily. *Id.* at 108 (quoting *State v. Ramseur*, 106 N.J. 123, 377, 524 A.2d 188 [1987] [Handler, J. dissenting] [internal quotations omitted]). It is used by courts either "as an augmentation of existing constitutional protections or as an independent source of protection against state action." *Id.* Here, both the due process clause and the Fundamental Fairness doctrine mandates that the State be required to justify its so-called suspicion of * * * in his presence so that he can protect his reputation and right to privacy against the State's arbitrary decision to conduct and *N.J.S.A.* 2C:41-5 investigation of him and to minimize the "unjustified harassment, anxiety [and] expense" which he has been forced to bear. *See Id.* at 109.

If the State is unwilling to furnish such information to the Court in * * * presence then it simply should be instructed to

conduct its investigation with other, less onerous, constitutionally permissible, investigatory methods. The Court Rules and Rules of Evidence cited by the State are wholly inapplicable to the unique and unconstitutional situation presented by the State's current use of *N.J.S.A.* 2C:41-5.

For example, the State here argues in effect that since grand jury proceedings are secret and since indictments may be kept secret until the defendant is in custody, the State should here be permitted to compel a private citizen to divulge personal information to the State. There is a significant difference, however, between a grand jury proceeding and an *N.J.S.A.* 2C:41-5 investigation, which is evidenced by the State's testimony at oral argument, has not been rigorously employed by the State. The dearth of reported cases interpreting this extraordinary provision comports with this testimony.

In addition, as set forth in * * * prior submissions and at oral argument, a grand jury stands between the prosecuting arm of the state and the citizen. The prosecutor must compile and present evidence to the grand jury for its consideration and the grand jury determines whether to subpoena witnesses or not to. Here, the prosecutor, i.e., the State, in effect seeks to subpoena the target of an investigation, commanding him to appear and give testimony to the State and to turn over documents to the State to assist it in its effort to build a case against him. However, the State here proceeds free of the intervening presence of the grand jury. Thus, there is no check on the power of the State to conduct a sweeping investigation into the personal affairs of a citizen, founded upon little more than an irrational hunch, and completely indifferent to the citizen's right to protect his privacy and his reputation.

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No showing has been made, moreover, to justify the issuance of a protective order. Given the extraordinary nature of this investigation, the rules cited by the State shed little, if any, light upon the issue. For example, the grounds and procedure set forth in Rule 3:13-3(f) for the issuance of a protective order primarily pertain to post-indictment discovery. To date, no indictment has been handed down. Other than by insinuating that . . . is somehow involved with organized crime, the State has made no showing that a protective order is necessary. Clearly, the State cannot be permitted to base its application for a protective order upon wholly unsubstantiated and inflammatory allegations.

Indeed, citing *Grodjesk v. Faghani*, 104 N.J. 89 (1986), the State recognized that * * * has a right to know what, if any, information the State has to support its *N.J.S.A.* 2C:41-5 investigation but argues that its information is privileged because revealing it would jeopardize its investigation. As previously addressed, if * * * is the target of this *N.J.S.A. 2C:41-5* investigation, as is now plainly evident notwithstanding the State's conflicting positions, then *N.J.S.A.* 2C:41-5 is unconstitutional as applied, and the State's obligation to furnish . . . the information on which it bases its *N.J.S.A.* 2C:41-5 investigation is moot. If, however, for the sake of argument . . . were deemed not the target of the investigation, then the State's *Grodjesk* assertion does not ring true. If . . . were truly not the target, then the State certainly could produce information in these sealed proceedings that would not jeopardize its investigation.

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CONCLUSION

For the above reasons, the State's untimely application for additional oral argument prior to you Honor's ruling on the constitutionality of *N.J.S.A.* 2C:41-5, facially and as here applied, should be denied. Alternatively, should your Honor be inclined to consider any proofs, the State's application for a protective order should be denied.

Respectfully submitted,

ANGELO R. BIANCHI
Attorney for * * *

ARB:ms
Federal Express
cc: William R. Gicking, Esq.
Deputy Attorney General
Via Facsimile

APPENDIX L — INVESTIGATIVE INTERROGATORY COVER SHEET AND DOCUMENT DEMAND

OFFICE OF THE ATTORNEY GENERAL
STATE OF NEW JERSEY

INVESTIGATIVE INTERROGATORY

TO: Custodian of Records

* * *

YOU ARE HEREBY DIRECTED to appear at the Division of Criminal Justice, Organized Crime and Racketeering Bureau, Richard J. Hughes Justice Complex, 4th Floor, West Wing, 25 Market Street, Trenton, New Jersey, before the undersigned Deputy Attorney General, on:
September 11, 1995 *at:* 10:00 a.m. *then and there to furnish information and testimony deemed necessary in connection with the enforcement of the New Jersey Racketeering Law N.J.S.A. 2C:41-1 et. seq., said conduct allegedly consisting of* The control and financing of * * * and its owner, * * * Organized Crime

You are further directed to produce at said time and place the following records:

See Attached Schedule A

You are advised, that prior to returning the interrogatory or making materials available you have a right to discuss the Interrogatory with legal counsel, pursuant to N.J.S.A. 2C:41-5, and that you have the right to file in Superior court a petition to modify or set aside the Interrogatory pursuant to N.J.S.A., 2C:41-5j.

Appendix L

This interrogatory is issued pursuant to N.J.S.A. 2C:41-5.

This Interrogatory may be complied with by delivering all of the requested material prior to the date set forth above to:
D.S.F.C. David Grusemeyer, New Jersey State Police
(609) 645-6642

WITNESS THE OFFICE OF THE ATTORNEY GENERAL, DIVISION OF CRIMINAL JUSTICE, THIS 25TH DAY OF JULY, 1995, MERCER COUNTY, NEW JERSEY

s/ Thomas W. Goan
Deputy Attorney General
Thomas W. Goan

* * *

SCHEDULE A

Produce any and all corporate and financial records for the period of May 11, 1978, to the present, to include but not limited to the following:

1. All partnership agreements, incorporation filings, annual reports, minutes of stockholder's meetings, stock ledgers, and purchase and sale agreements.

2. Cash Disbursement Journals.

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3. Canceled checks, bank statements, and deposit tickets.

4. Purchase invoices, account payable ledgers.

5. Payroll account records, including canceled payroll checks. Employee lists, job descriptions and last known business and home address.

6. Cash receipts journals.

7. Sales invoices, accounts receivable ledgers.

8. All correspondence memoranda, and notes.

9. Copies of all Federal and State Corporate Income Tax Returns, Sales Tax Returns, and Wage Reporting Returns.

10. Copies of accounts work papers to include trial balance and adjustments to the trial balance.

11. Any and all notes payable, loans payable, mortgages payable, and credit card accounts, to include applications, account numbers, and current balances. (THIS IS TO INCLUDE ALL LIABILITIES NOW SATISFIED),

12. Any and all notes receivable, loans receivable, mortgages receivable, to include applications, notes, security agreements, balances, and payment histories. (THIS IS TO INCLUDE ALL RECEIVABLES NOW SATISFIED).

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13. Appraisals for any property listed as security or collateral in any agreement related to any performance bond obtained.

14. Any and all documents relating in any way to any construction projects worked on, whether as prime contractor, construction manager, or in some other capacity.

15. All financial and accounting records related to each contract listed in paragraph 14, the costs your company incurred for each contract (including actual subcontractor costs) and profit earned by your company on each contract (including how such calculation was made) and your company's expense accounts for each contract (including all supporting documentation, receipts, and voucher slips.

16. All telephone toll records.

17. All documents relating to any transfer of, or promise to transfer, anything of value to or from * * * to any Union Representative or Official, or any individual with a familial relationship to any Union Representative or Official, whether authorized or not, whether by formal agreement or not and whether directly or indirectly, including, but not limited to any payment, joint investment, business transaction, gift, gratuity or bribe.

18. All documents related directly or indirectly to the acquisition of * * * including documents

related to capitalization and financing and documents related to the assets and liabilities acquired from the dissolution of any other company.

19. Any and all records relating to any financial, ownership, or other interest in the company held by any individual or entity.

CLAIMS OF PRIVILEGE

For any document (or part thereof) which is withheld under a claim of privilege:

A. Identify the document;

B. Identify all persons to whom copies were sent or distributed and all other persons to whom the document or its contents were disclosed in whole or in part;

C. State the document's current location and the name of its current custodian(s);

D. State the basis on which the privilege is claim;

E. State the number(s) of the specification to this interrogatory to which the document is responsive.